MODERN REPORTS;

OR,

SELECT CASES

ADJUDGED IN

THE COURTS

OF

KING's BENCH, CHANCERY, COMMON PLEAS, AND EXCHEQUER.

VOLUME THE TENTH;

CONTAINING,

Cases in Law and Equity, chiefly during the Time the late Earl of Macclesfield presided in the Courts of King's Bench and Chancery, &c. from the Eighth Year of Queen Anne to the Eleventh Year of King George the First inclusive.

THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

By THOMAS LEACH, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW,

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1795.

THE

PREFACE.

THE following Papers were, at first, only designed for private use; but as the Author (a) has, for several years last past, been settled in a remote part of the kingdom, he thought he could not employ some leisure-hours more serviceably to his Country than in publishing the best part of his Notes for the public benefit.

The Reader will no doubt observe, that they consist of a variety of remarkable Cases, few of which are to be found extant in other REPORTS.

The Author can with great assurance acquaint the Reader, that in every-thing here published he has given him the sense, though not the words, of both the BAR and the BENCH.

(a) ROBERT LUCAS, Esq. of the *Inner-Temple*.

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TRINITY TERM,

The Eighth of Queen Anne,

IN

The Year

1710,

IN

The Court of Chancery.

WILLIAM, *Lord* COWPER, *Chancellor.*
Sir* John Trevor, *Knt. Master of the Rolls.

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*[1]

* Earl of Bath *against* Sherwin.

Case 1.

The court of chancery may grant a *perpetual injunction*, after five trials at bar on the same point, and verdicts the same way.

S. C. Prec. Ch. 261
S. C. 2. Eq. Ab.

THE CASE before the Court was thus: A vexatious person having tried his right in an *ejectment* at law five several times, the court of chancery was moved for a *perpetual injunction* to stop all further proceedings at law (*a*).

COWPER, *Lord Chancellor*, was of opinion that it could not be granted. The jurisdiction of the court of chancery is generally divided into three parts; fraud, trust, and accident. It is plain that the Court has not a power to do what is desired in virtue of the two first branches of its jurisdiction; nor can it, I think, under the last; for by accident is meant when a case is distinguished from others

171. 243. S. C. 1. Bro. P. C. 266. S. C. 4. Viner, 426. S. C. 14. Viner, 431. Gilb. Rep. Eq. 2. Salk. 255. Stra. 554. 681. 1152. 2. Bl. Rep. 1160. 1724.

(*a*) The single question on all these five trials at bar was, Whether *Christopher Duke of Albemarle* was or was not the lawful son and heir of *George Duke of Albemarle*? Notwithstanding the uniform event of these five trials in favour of *Duke Christopher*, other declarations in ejectment were delivered; whereupon this bill was exhibited in chancery, praying that all questions touching the legitimacy of *Duke Christopher*, or concerning his being the son and heir of *Duke George*, might be quieted and extinguished, and to that end that a *perpetual injunction* might be awarded, to stay all further proceedings at law upon the said pretended title, &c. S. C. 1. Brown, P. C. 268.

EARL OF BATH *against* SHERWIN.

of the like nature by unusual circumstances. For the court of chancery cannot controul the maxims of the common law, because of general inconveniencies; but only when the observation of a rule is attended with some unusual and particular circumstance which creates a personal and particular inconvenience. * This now is
*[2]
the case before the Court; for it is a known maxim of the common law, that a man may try his title as often as he pleases in an ejectment. Now for this Court to determine that one, two, three, or more unsuccessful trials by ejectment shall be peremptory, *quid aliud* than to assume a legislative power, and alter the maxims of the common law? But, FIRST, it may be objected, that this is sometimes done; for is not the penalty of a bond due by law, in case of non-payment of the money upon the day? and yet this Court decrees not only upon extraordinary cases, where the payment of the money at the time appointed, by reason of some accident or misfortune, is become difficult, or impossible, but even in all cases, where the obligor might have complied with the condition, that the penalty is not forfeited. But to this it may be answered, that the Court in this conduct is sure of doing justice with an unerring hand, and in all events; for the Court never saves the obligor from the penalty of the bond, before he has made a full satisfaction to the obligee, both in respect to the principal, interest, and costs. But now should the Court decree, that two, three, or more unsuccessful trials by ejectment shall be peremptory, the Court would be very far from doing justice in all events: for proceedings at common law are tied up to very strict rules, and a man who has a very good title may be cast through some slip in the proceedings, or a man may have better evidence at one time than another. Besides, as often as the plaintiff loses in an ejectment, the Court gives costs, which is by law intended as a recompence; and though where fees are liberally given, it does not near come up to it, yet if things were managed more frugally, it would come much nearer.—* SECONDLY, It may be objected,
*[3]
that where the court of chancery directs two trials by ejectment, and the plaintiff is cast in both, this is peremptory; and what difference is there between trials at common law by ejectment directed out of chancery, and those not directed? But where trials are directed by this Court, the Court has a previous knowledge of the evidence, and so the Court can the better judge. Certainly it does not follow, that because in trials relating to causes originally belonging to the jurisdiction of this Court, and which are directed to be tried at law by this Court, the Court in these cases determines how many trials shall be peremptory; therefore this Court may grant a perpetual injunction to proceedings at law, in matters triable at law and not in equity, and that only for doing what the law allows. But after all, the very ground of this objection fails; for even in cases of ejectments directed by this Court, two unsuccessful trials are not so peremptory, but that upon good cause another may be granted, which strengthens the reason of the common law.—THIRDLY, It may be said, that *boni est judicis*

judicis ampliare legem. But this maxim is not to be underſtood as that a Judge in equity ſhould alter the maxims of the common law, for this would be to aſſume a power paramount to the law. The utmoſt that can be meant by this maxim, if it has any meaning in it, is, that this Court, provided it has the law to juſtify it, ſhould ſometimes uſurp upon the juriſdiction of the courts at law (a). If this Court ſhould extend its juriſdiction in this point, it might by parity of reaſon extend it in other points, *viz.* determine how often diſtreſſes ſhall be taken. A collateral warranty was certainly one of the harſheſt and moſt cruel points of the common * law, becauſe there was not ſo much as an intended recompence, yet I do not find that this Court ever gave relief in it. If I had been inclined to enlarge the juriſdiction of the Court, I think it would be extremely difficult to fix any ſtanding rule in this caſe (b).

EARL OF BATH *against* SHERWIN.

* [4]

(a) See Lord Mansfield's opinion of the meaning of this maxim, 3. Burr. 301. 304.

(b) The bill praying the perpetual injunction was accordingly diſmiſſed, S. C. Prec. Chan. 261. S. C. 4. Viner Abr. 426. But the plaintiff appealed from this decree to THE HOUSE OF LORDS, and after hearing Counſel it was ORDERED and ADJUDGED, That the decree of diſmiſſion complained of ſhould be reverſed, and that the court of chancery ſhould forthwith iſſue a *perpetual injunction* to ſtay the proceedings at law. S. C. 1. Brown Caſ. Parl. 27[illegible].

TRINITY TERM,

The Eighth of Queen Anne,

IN

The Queen's Bench.



Sir John Holt, *Knt. Chief Juſtice.*

Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.*

Sir James Mountague, *Knt. Attorney General.*
Sir Simon Harcourt, *Knt. Solicitor General.*

The Caſe of Andrew Artemonowitz Mattucof, Ambaſſador of Muſcovy. — Caſe 2.

THE QUESTION was, Whether AN AMBASSADOR could by law be arreſted for debt.

By the law of nations, neither an ambaſſador, nor any of his train or comites, can be proſecuted for any debt or contract in the courts of that kingdom wherein he is ſent to reſide.

SIR JAMES MOUNTAGUE, *Attorney General.* He cannot. If the privileges of an ambaſſador may by law be broken in upon and invaded for the preſervation of the property of a private ſubject, princes will be cautious of ſending ambaſſadors to us; ours muſt expect the like treatment; and few will be prevailed with to take that character upon them. Should an ambaſſador be liable to the reſtraints of the law of the land to which he goes, how eaſy would it be, upon an emergency, to take off his attendance upon his maſter's buſineſs? Does the law of *England* privilege the body of a *member of parliament*, and of a *ſoldier*, and ſhall it not that of an *ambaſſador*? The perſon of an ambaſſador has ever been held ſacred and inviolable, by the law of nations. The goods of an ambaſſador are not liable to diſtreſs, *à fortiori*, not his perſon. An ambaſſador muſt be intreated, and upon refuſal ſent back to his maſter. If an ambaſſador commit a crime of a tranſcendant nature, the king *a quo, non ad quem*, muſt puniſh

Puffendorf bk. 8. c. 9. ſ. 9. Rycker. c. 17, 18, 19. 1. Roll Rep. 175 185. 3. Bulſt 27. 4. Inſt. 153. Foſter, 188. 1. Bl. Com. 255. Str. 797. Fitzg. 200.

THE CASE OF ANDREW ARTEMONOWITZ MATTUEOF, AMBASSADOR OF MUSCOVY.

punish him. LORD COKE says, *legatos violari contra jus gentium*; nor does he add, as certainly he would, had he thought so, that though this be so in the civil law, it is not so in ours. * An ambassador does by fiction of law represent the person of his master: Thus COKE, upon the statute 25. *Edw.* 3. c. 2. affirms, that it is high treason at the common law to kill an ambassador. Now certainly nobody will say THE CZAR himself might have been arrested. The same fiction of law that makes him represent the person of his master, makes him *extraparochial*, and *quasi* in the dominions of his master. The ill treatment of ambassadors is a thing of dangerous consequence, for it may involve the nation in a war, and it would be very inconvenient that this should be in the power of any private person whatsoever.

CONTRA, *it was said*, If this be so, a subject may be left without remedy for the recovery of his debt, which would be a defect in law. Justice ought always to be reciprocal, but an ambassador may arrest, *ergo*, &c. It is a maxim in law, that the royal prerogative does no wrong, and shall the prerogative of an ambassador surmount that of the crown? Such a law as this would be a nullity, because contrary to MAGNA CHARTA, cap. 29. *Nulli vendemus, nulli negabimus, aut differemus justitiam, vel rectum.* An ambassador by his contract renounces his privilege as far as to subject himself to the laws in force in that country where the contract was made (*a*).

(*a*) The persons who were concerned in this arrest were examined before the privy council, and seventeen were committed to prison; most of whom were prosecuted by information in the court of queen's bench at the suit of the Attorney General, and at their trial before Lord Chief Justice HOLT, were convicted of *the facts* by the jury; reserving the question of law, how far these facts were criminal, to be afterwards argued before the Judges; which question was never determined, 1. Bl. Com. 255. Boyer's Annals of Queen Anne. But to satisfy the clamours of the foreign ministers, who made it a common cause, as well as to appease THE CZAR, all the proceedings, &c. against the said ambassador are, by 7. *Ann.* c. 12. declared void, and it is enacted, "that "all writs and processes that shall at any "time afterwards be sued forth or prosecuted, wher by the person of any ambassador or other public minister of any "foreign prince or state, authorized and "received as such by her majesty, or the "domestic or domestic servant of any "such ambassador or other public minister, may be arrested or imprisoned, or "his or their goods or chattels may be distrained, seized, or attached, shall be "deemed null and void; but it is provided, that no merchant or other trader "whatsoever, within the Statutes of "Bankrupts, who shall put himself into "the service of such ambassador, &c. shall "have any manner of benefit by this act; "and also that no person shall be proceeded against for having arrested the servant of any ambassador, &c. unless the "name of such servant be first registered "in the secretary of state's office; and "transmitted by such secretary to the "sheriff of *London*, &c. who shall hang "up the same in some public place in "their offices, whereto all persons may "resort and take copies thereof, without "fee or reward."—For judicial decisions on this statute see Barbuit's Case, Cases T. T. 281. Triquet *v.* Bath, 3. Burr. 1748. Seacomb *v.* Bowlney, 2. Wils. 20. Heathfield *v.* Chilton, 4. Burr. 2015. Poitier *v.* Croza, 1. Black. Rep. 48. Wedmore *v.* Alvares, Stra. 797. Ld. Ray. 1594. Carolina's Case, 2. Wils. 78. Holmes *v* Gordon, Annally's Rep. 2. Masters *v.* Manby, 1. Burr. 401. Lockwood *v.* Cousgarne, 3. Burr. 1676. Hopkins *v.* De Roebuck, 3. Term Rep. 79.

MICHAELMAS TERM,

The Eighth of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Justices.*
Sir Henry Gould, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*

Sir Simon Harcourt, *Knt. Solicitor General.*

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* Anonymous.

Case 3.

BY A RETURN to a *habeas corpus*, it appeared, that in the city of *London* there is a custom, that if a *feme covert* exercise a trade in which her husband does not at all concern himself (*intromittere*), she may be sued as a *feme sole*, for debts contracted in the carrying on of that trade; and if she has not goods that are not her husband's, she must be imprisoned until she pay them; and as she may be sued, so she may sue as a *feme sole* for debts owing her, in her way of trade, and within the city. She has a special and separate interest in the profit of her trade, or else it were an unreasonable custom (*a*).

By the custom of *London*, a *feme covert* may carry on trade as a *feme sole*; and may sue and be sued without her husband.

Cro. Car. 68.
3 Burr. 1784.
1. Bl Rep. 570.
2. Com Dig.
"Baron and Feme" (A. 2.).

(*a*) But it is decided, that a *feme covert* cannot sue without her husband as a sole trader, by the custom of *London*, in the superior courts at Westminster, Caudell v. Shaw, 4. Term Rep. 361.

 HILARY

HILARY TERM,

The Eighth of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*
Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Justices.*
Sir Henry Gould, *Knt.*
Sir Simon Harcourt, *Knt, Attorney General.*
Sir Robert Eyre, *Knt. Solicitor General.*

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* [7]

* Hadley *against* Styles.

Case 4.

In debt on bond for 300l. and *nil debet* pleaded, a verdict of *nil debet* for 200l. and *debet* for 100l. is good.

S. C. 2. Salk. 664.
Moor, 957.
1. Roll. Rep. 257.

IN A WRIT OF ERROR upon a judgment in the court of common pleas, the error insisted upon was this:

An action of debt was brought, and the jury found for the plaintiff as to part, and for the defendant as to the rest.

IT WAS OBJECTED that this verdict was naught, because a debt is an entire thing; and upon a *nil debet* the jury cannot sever; and should a man bring an action of debt for eighty pounds, and declare for less, this would be a variance between the writ and the count, unless he shewed how the rest was satisfied.

This THE COURT agreed to:

But yet THE COURT were of opinion, that if the party brought an action for the whole debt, and a part of it was paid, the jury might, upon a *nil debet*, sever, as in case of rent.

Adjournatur.

EASTER

EASTER TERM,

The Ninth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*

Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Justices.*
Sir Robert Eyre, *Knt.*

Sir Simon Harcourt, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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* [8]

Case 5.

* Sir Edward Seymour's Case.

The plaintiff in ejectment may give parol evidence of the contents of a deed in the hands of the defendant, after notice and refusal to produce it.

Bull. N. P. 294.
4. Burr. 2488.
2. Term Rep. 201.

IN A TRIAL OF EJECTMENT between *Sir Edward Seymour* and his mother-in-law, the Court allowed the contents of a deed to be given in evidence, by witnesses; nay witnesses who put the contents of the deed in writing upon memory, four or five days after reading the deed.

THE COURT seemed of opinion, that in case a deed was lost by some inevitable accident, that there it might be proved by a copy. But in case there was no copy, the contents of it could not be proved from the memory of those that knew the deed; and though it were hard for a man that had no copy, to lose the benefit of his deed, yet the inconveniencies of admitting that sort of evidence would be greater.

But here the opinion of the Court was founded upon a particular reason, for the deed by which the plaintiff was to prove his title was not lost, but proved to be in the hands of the defendant; so that in this case the danger of allowing this sort of evidence was none at all; for if the defendant was wronged by the parol evidence, it was in his power to set all right by producing the deed.

TRINITY

TRINITY TERM,

The Ninth of Queen Anne,

IN

The Queen's Bench,

Sir Thomas Parker, *Knt. Chief Justice,*
Sir John Powell, *Knt.* }
Sir Lyttleton Powys, *Knt.* } *Justices.*
Sir Robert Eyre, *Knt.* }
Sir James Mountague, *Knt. Attorney General,*
Sir Robert Raymond, *Knt. Solicitor General,*

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* Parish of Honiton *against* St. Mary Axe.

Case 6.

A certificate only concludes the parish granting it, against the parish to which it is granted.

S. C. 2. Salk. 535.
S. C. 1. Sess. Cas. 8.

A. is sent from the parish of *H.* to the parish of *C.* with a certificate, subscribed by the churchwardens of *H.* and two justices of the peace; whereby at the time of his removal he is acknowledged a settled inhabitant of the parish of *H.* *A.* grows chargeable to the parish of *C.* who by virtue of that certificate send him back to *H.*

The question was, Whether this certificate of the parish of *H.* shall not be a conclusion or an estoppel to the parish of *H.* from saying that his last settlement was at some other parish; not only with respect to *C.* for of that there was no doubt, but with respect to any other parish whatsoever.

The reasons urged why this certificate should be an estoppel only with respect to the parish of *C.* were,

First, and especially, A case of two parishes in the town of *Northampton*, in the second year of *Queen Anne* (*a*), where, upon an order removed by *certiorari* into the court of king's bench, this very question was so determined.

(*a*) 2. Salk. 530.

* Secondly,

Parish of Honiton against St. Mary Axe.

* Secondly, Upon supposition that this certificate was to be esteemed an estoppel from finding out any settlement whatsoever, it will make churchwardens very cautious of putting their hands to such certificates, which will in a great measure prevent the benefit of the statute 8. & 9. *Will.* c. 30.

Thirdly, It is not reasonable that the indemnification should extend farther than the damnification; if therefore the parish of *C.* the only parish damnified, be indemnified, this is enough.

Fourthly, No injury is done to any one by this interpretation of the act, for if the third parish to whom he is sent, can shew that he had not his last settlement there, then all things are *in statu quo*; but if the truth is, that he was really settled there, then that parish ought to provide for him. But taking the law to be the other way, *viz.* that according to the meaning of the act, the certificate is a conclusion from finding any settlement in any parish whatever, the parish granting it may be obliged to maintain him in their own wrong.

Fifthly, It is not fit that it should be in the power of churchwardens to prejudice the parish in matter of property.

Sixthly, The statute mentions the two parishes only.

The arguments *for the other side* of the question were:

First, Expedient, or not expedient, is no good argument against the express letter of a law.

Secondly, The parliament never supposed, that the churchwardens and justices of the peace would certify a falshood; and therefore the act says, "that the certificate shall oblige the parish that gives "it, to receive and provide for, &c. when he becomes chargeable;" but according to this construction the parish is not obliged, &c.

Thirdly, As to what was said, that this would make people cautious of granting certificates, it may be answered, that the easing the parish for a time, and it may be for ever, will be motive enough.

*[11] * Fourthly, The statute of the 3. *Will.* & *Mary*, c. 12. says, "that the paying of taxes shall make a settlement;" if therefore he pay taxes at *C.* and by virtue of this certificate is sent back to *H.* the third parish to which by this construction he must be sent, will lose an advantage that the law gives it. Besides, what shall hinder the third parish from sending him back to *C.* and so by consequence the end of the act, which was most certainly the indemnification of *C.* will be frustrated.

Fifthly, There is no doubt but it is in the power of churchwardens to damage the parish, and that in matter of property too, as by taxing an indigent person, and so consequently making a settlement. According to this construction the inconvenience is little or none, for it is but to take care to certify the truth. But according to the

other construction all will be set a-float again, and poor persons harrassed and oppressed by being sent for ever from parish to parish.

Parish of Honiton against St. Mary Arches.

The Court were clearly of this opinion, but took time to consider of the *Northampton precedent* (*a*); but afterwards, *ut audivi*, held the certificate an estoppel upon *Honiton* against the whole world (*b*).

(*a*) The case of All Saints *v*. St. Giles, 1. Salk. 530. pl. 16.

(*b*) S. C. 1. Sess. Cases, 8. and S. C. 1. Salk. 535. *accordant*. But the authority of this case is denied, and it is now determined that a certificate is only *conclusive* upon the parish granting it, with respect to that parish to which it is granted, though it is *prima facie* evidence as to others, Rex *v*. Lubbenham, 4. Term Rep 251. 2 Const's P. L. 730. pl. 647 See also Rex *v*. New Windsor, 1. Stra 186. and Rex *v*. Petham, Burr. S. C. 154.

MICHAELMAS

MICHAELMAS TERM,

The Ninth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*
Sir John Powell, *Knt.* }
Sir Lyttleton Powys, *Knt.* } *Justices.*
Sir Robert Eyre, *Knt.* }
Sir Simon Harcourt, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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* Buckley *against* Pirk.

Case 7.

An executor cannot plead *plene administravit* to an action for rent or non-repair, on the covenant of the testator.

IF AN EXECUTOR take possession of the term of the testator, and an action is brought against him in the *debet* and *detinet* for rent or non-repairs, it is absurd for him to plead "NO ASSETS "*ultra*" what will satisfy such and such judgments, because in such a case, the surplus of the profits, rent, and repairs deducted, is all that is assets, and liable to the judgments; and therefore the rest of the profits are so appropriated to the payment of rent and repairs, as not to be exhausted by debts.

S. C. 1. Salk. 317. 1. Wils.

Banister *against* Hopton.

Case 8.

Spiritual court jurisdiction.

IT WAS AGREED, in a motion for *a prohibition* in this case, that though a prescription, as whether a whole parish or a select vestry should chuse churchwardens, be a matter triable at common law BY A JURY, yet sentence is to be given in the spiritual court according to their verdict; and therefore though this be a matter triable at common law, yet if the party submit to a trial in the spiritual court, by not demanding *a prohibition*, it will be too late after sentence to move for one.

2. Salk. 548.

Case 9. **Forte** *against* **Buviere.**

Parishioners are rateable to the building of a gallery in the church.

S. C. 1. Sess. Cases, 13. 1. Roll. Rep 24. 2. Inst. 489. 1. Salk. 164. 2. Roll. Abr. 291. 3. Mod. 211. 3. Burr 1689. 1. Sess Cases, 84.

THE major part of the parish, assembled in vestry, taxed the parish for building of A GALLERY, each parishioner ten times the value of an ancient rate. One parishioner refused payment, and was sued in the spiritual court, whereupon he prayed a prohibition.

FIRST, Because a parish cannot be taxed for building A GALLERY, which was neither useful nor ornamental to a church.

THE COURT was of opinion, that although before the Reformation few churches had any pews in them, yet as they have been since thought necessary, and the parish is chargeable with them, if there are not pews sufficient in the body of the church, the parish may be charged with the building of galleries; but that the churchwardens are not punishable for neglecting to erect them, as they are for not repairing the bells.

Churchwardens may make a new rate upon the model of an old, but cannot make a standing rate.

SECONDLY, The oldness of the rate. But the cases produced to maintain the prohibition on this head, did not come up to it; they being granted in cases where the rate was to continue always the same; but here there was a new rate modelled by the old; and if ten times the value of the old rate had been put into one intire sum, it would have been plain; besides, there is no need for the parish to depart from an old rate, until it grow unequal.

THE COURT was of opinion, that churchwardens cannot make a standing rate *pro omnibus temporibus*, or to bind their successors, because circumstances may alter, even though it was when made an equal rate, for it may become unequal: but that in the present instance it was *a new rate* assessed on the model of an old rate.

Case 10. Parish of St. Mary of Reading *against* St. Lawrence of Reading.

Exercising the office of warden, in the parish where a man lives, is a settlement within 3. [illegible] Will. & [illegible] 11 f. 6. [illegible] he be not chosen by the parish, and exercises his office through the whole borough.—S. C. Foley, 121 S. C. Fort 310. S. C. 19. Viner, 379. S. C. 3. Burr 505. S. C. Sett. & Rem. 3. S. C. 2. Bott, 282.

ONE *Joseph Marlow* was first an inhabitant of *St. Mary, Reading*; afterwards he came into the parish of *St. Lawrence, Reading*; and during his stay there, was chosen *warden for the borough*, and exercised that office as well in that parish as in some others: Afterwards he removed to *St. Mary's*, and there became chargeable.

The question was, Whether his residing in the parish of *St. Lawrence*, and exercising the office of *warden of the borough* in that parish, though he did it in others too, was a settlement, by the 3. & 4. *Will. & Mary*, c. 11. f. 6. or no?

THE

The Counsel for the parish of *St. Lawrence* insisted, that to make a settlement pursuant to the statute 3. & 4. *Will. & Mary*, c. 11. two things were requisite.

First, That the office must be a publick and annual office for the parish; and that this was not an office for the parish but for the borough; neither was he chosen by the parish.

Secondly, That it must be executed in the parish; but this office, though it was executed in the parish of *St. Lawrence*, was executed in other parishes too; and upon this ground it was very lately adjudged, that the payment of a *scavenger's rate*, being a ward rate, was no settlement within the act (*a*).

Powell, *Justice*, was of opinion, that this was a settlement within the act, and that a man exercising an office in a parish, though in another too, and though not chosen by the parish only, might yet be esteemed properly enough a parochial officer.

Parker, *Chief Justice*. The words of the act are as general with respect to the payment of taxes, as to the exercise of offices; and therefore since the payment of a *scavenger's rate* did not, in the opinion of the Court, because a ward rate, amount to a settlement, by a parity of reason, neither will the exercise of such an office.

Powys, *Justice*, was of opinion, that he was a parochial officer, and more; and that therefore he had gained a settlement.

Eyre, *Justice*. The statute 1. *Jac.* 2. c. 17. made notice in writing left with the overseer of the parish necessary to a settlement. The payment of taxes and the exercising of offices, upon the equity of that act, have been adjudged equivalent to a notice in writing (*b*), and this act of the 3. & 4. *Will. and Mary*, c. 11. seemed to him made for the corroborating the equitable constructions upon that statute. He was of opinion that it was a settlement, and that there was a vast * difference, in point of the notoriety, between the payment of a scavenger's rate, and exercising the office of a scavenger; for the one might escape the notice of the parish, the other not. * [15]

Parker, *Chief Justice*. If the reason of the act be founded upon the notoriety of the fact, Mr. Justice Eyre is in the right. But he was of opinion, that the act went upon this reason, *viz.* that a person chosen to a parochial office, or assessed to a parochial rate, was not a person likely to become chargeable; and this was the reason why a hiring for a year, and a service accordingly, make a settlement.

(*a*) St. Giles Cripplegate *v.* St. Mary Newington, 19. Viner Abr. 386. 2. Bott P. L. 226 But now by 9. *Geo.* 1. c 7. f. 6. "no person whatsoever who shall be taxed to the scavenger, and shall pay the same, shall be deemed to have a settlement by reason of paying such scavenger's rate."

(*b*) But see Rex *v.* Payne, 1. Show. 12. 3. Mod. 247. Rex *v.* Talbury, Foley, 123. Rex *v.* Chertsey, 5. Mod. 454. Rex *v.* Abbot's Langley, 2. Bott. P. L. 125. 2 Stra. 835. *contra*.

 The

Parish of St. Mary of Reading *against* St. Lawrence of Reading.

The next Term, by consent of ALL THE COURT, it was adjudged a settlement (*a*).

(*a*) See Gatton *v.* Milwich, Salk. 536. Bisham *v.* Cook, Stra. 411. Peale *v.* Bourne, Stra. 942. St. Maurice *v.* St. Mary Kalandar, Burr. S. C. 27. Rex *v.* Whitchurch, Burr. S. C. 365. Rex *v.* Winterbotham, Burr. S. C. 520. Rex *v.* Liverpool, 3. Term Rep. 118. Rex *v.* Whittlesea, 4. Term Rep. 807. and 2. vol. of Mr. Const's edit. of Bott's Poor Laws, 282 to 310. where all the cases on this subject are collected.

Case 11.

Cook *against* Parsons.

Depositions in chancery not good evidence to destroy the validity of a will.

Bull. N. P. 239.
2. Stra. 920.
1. Stra. 101.
1. Salk. 286.
4 Mod. 146.
5. Mod. 211.

AT A TRIAL at *nisi prius*, in *London*, the case was this: It was said at the conclusion of a will, "*signed, sealed, and delivered*" by such a one, "testator," and then subscribed by three witnesses.

It appeared by depositions in a chancery cause, whereof the bill and answer were lost, that they subscribed the will in the presence of the testator, but at three several times (*a*).

The verdict was for the plaintiff; but a case of two points was agreed upon for further arguments:

FIRST, Whether, the bill and answer being lost, the depositions could be admitted as evidence?

PARKER, *Chief Justice*, who tried the cause, was of opinion, that the depositions signed by the witnesses, though the bill and answer were lost, might be allowed as evidence to supply any point where the will was silent, but not to contradict the will.

Execution of a will.

The SECOND POINT was, Whether the signing of three witnesses, but at three several times, was a good execution of the will within the statute of Frauds and Perjuries (*b*)?

(*a*) See S. C. Prec. Chan. 184. 1. Eq. Abr. 280. 2. Eq. Abr. 371. 761.

(*b*) It has been determined that the witnesses may subscribe the will at different times; but they must see the testator sign or hear him acknowledge his signature, and the subscribing must be in his presence. Freem. 486. Prec. Chan. 185. 2. Chan. Cases, 109. See also, Longford *v.* Eyre, 1. Peer Wms. 740. Carleton *v.* Griffin, 1. Burr. 549. Right *v.* Price, Dougl. 229. Casson *v.* Dade, 1. Bro. Caf. Ch. 99. Ellis *v.* Smith, F. Vezey's Rep. 11.

HILARY

HILARY TERM,

The Ninth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*
Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Justices.*
Sir Robert Eyre, *Knt.*
Sir Simon Harcourt, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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*[16]

* Goodwin *against* Godwin. Case 12.

THE point in question was, Whether an action of debt founded upon a judgment in the king's bench, might be brought, pending *a writ of error* in THE EXCHEQUER-CHAMBER.

Debt lies on a judgment in the king's bench, pending a writ of error in the exchequer-chamber.

IT WAS ARGUED *in favour of the affirmative*, that the judgment was not suspended by the writ of error; because, if it was, a release of all demands would not be a release of a judgment pending a writ of error, which undoubtedly it is. It was also said to be a received rule in the common pleas, that an action of debt would lie upon a judgment in the common pleas, pending a writ of error in the king's bench; and that by parity of reason it ought to do so upon a judgment in the king's bench, pending error in the exchequer-chamber; and all this was fortified by several cases in point (*a*).

1. Lev 92. Cowp. 72. 3 Com. Dig. "Debt" (A. 2).

THE COURT. These actions of debt pending writs of error were never favoured, either by LORD HALE, or by HOLT, *Chief Justice*.

* The point in question was given up upon account of the number of cases in point, that debt would lie pending error. *[17]

(*a*) See 1. Sid. 236. Lutw. 602. 1. Lev. 153. Raym. 110. 1. Wils. 116.

On a writ of error on a judgment in the king's bench to the exchequer-chamber, a transcript of the record, and not the record itself, is removed.

SECONDLY, It was said, that the record was not removed by the writ of error, but that only a transcript was sent for.

But IT WAS STRONGLY INSISTED upon, and the statute of 27. *Eliz.* c. 8. relied upon for that purpose, that the very record itself was, in point of law, removed by the writ of error, and that therefore the declaration was naught, being of a record in *the king's bench*, whereas it should have been upon a record in THE EXCHEQUER-CHAMBER.

1. Sid. 236.
1. Lev. 153

THE COURT. It is to be considered, whether, though in fact *a transcript* was only sent, yet whether in point of law the record itself was not removed, because without it the judgment itself could not be affirmed or reversed; and also whether they could suppose the record in two places at once, in the one place to support debt, in the other error (*a*).

The authorities only kept the Court from rejecting these actions; and therefore, though they held the writ of error to be no plea in bar, yet they doubted whether they might not admit it as a plea in abatement.

Adjournatur.

No bail in debt on a judgment
3 Salk. 55.

NOTE, In these kind of actions, to discourage them, bail never allowed (*b*).

(*a*) See Vicars *v.* Heyden, Cowp. 423

(*b*) See, upon this subject, Sellon's Practice, 43 to 50.

EASTER

EASTER TERM,

The Tenth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir Thomas Powys, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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*[18]

* Jeffry *against* Barrow. Case 13.

THIS was an action of debt upon bond, brought against the heir;" and, upon "*riens per discent*" pleaded, the plaintiff replied, that he had lands, &c. sufficient to discharge, &c. The jury find for the plaintiff; *viz.* that sufficient lands to discharge, &c. did descend.

In debt against an heir, if the defendant plead *riens per discent* at the time of the original purchased, and the plaintiff reply "sufficient lands "by discent," and the jury find that he had sufficient lands by discent, without finding *the value* of the lands, A REPLEADER shall be awarded.

IT WAS MOVED *in arrest of judgment*, that this pleading being grounded upon 3. & 4. *Will. & Mary*, c. 14. that act ought to have been exactly pursued; and then the issue should have been only, whether any lands descended, and not the value of the lands; and if the jury found for the plaintiff, then the jury were to inquire of the value.

PARKER, *Chief Justice*, seemed to incline to the defendant merely upon this point, that it did not appear by this verdict, whether, when the jury found the descent of sufficient lands, they meant sufficient in respect to the debt in equity, or at common law, *viz.* the penalty: probably the jury intended, the equitable debt only; whereas judgment must be given upon the penalty. The

S. C. Gilb. 141. 279.
2. Roll. Abr. 71.

5. Mod. 123. 3. Salk. 180. 5. Com. Dig. "Pleader" (2. E. 4.). 3. Bac. Abr. 28.

JEFFRY *against* BARROW.

plaintiff put himself to great hazard in this way of pleading; for though it had been found that lands were descended, yet if these lands were found insufficient, judgment must have been given for the defendant.

POWELL, *Justice*, doubted whether, this not being an *immaterial issue*, but a material one, and more, it was not helped by 32. *Hen.* 8. c. 30. He doubted likewise whether, if it were not, yet this being an issue appointed by this act, and more, it might not be supplied by another inquisition by another jury.

POWYS and EYRE, *Justices*, were of another opinion as to this point, for the statute says "the jury," *viz.* the jury that tried the cause.

POWYS, *Justice*, as to the principal matter, concurred with PARKER, *Chief Justice*.

EYRE, *Justice*, was of opinion, that this verdict was equivalent to an inquisition.

THE COURT thought, that the end of the act of parliament was to help the creditor in case of alienation, and also the heir, that he might not run such a risque in pleading "*riens per descent*" as to subject himself to the payment of the whole, if but a penny was found to be descended (*a*).

(*a*) This case was argued a second time; and THE COURT, it is said, awarded a repleader, because it was part of the duty of the jury upon this issue to find the value of the lands which the defendant had by discent. S. C. Gib. Rep. 282.—See the case of Redshaw *v.* Hester, 5. Mod. 123. 3. Salk. 180.

EASTER

EASTER TERM,

The Tenth of Queen Anne,

IN

The Court of Chancery,

Simon, Lord Harcourt, *Lord Keeper.*

Sir John Trevor, *Knt. Master of the Rolls.*

Gibson *against* Albert. Case 14.

Evidence. Chancery.

S. C. 2. Eq. Abr. 396.

OBITER: If a man unnecessarily make any one a defendant, he thereby cuts himself off from the benefit of his evidence, for it is his own fault.

But where several are made defendants, it will not hinder any one of the defendants from the benefit of the evidence of any others that are made so.

* Indeed, in case of trustees, it is necessary that they be made defendants, and therefore there the plaintiff may have the benefit of their evidence. * [20]

Brown *against* Litton. Case 15.

If the captain of a trading vessel die on the voyage, and the mate takes upon him the management of his investment, the court of chancery will allow him a reasonable recompence for his care and trouble, and oblige him to account for the profits, and not permit him to take *the capital* at a *respondentia interest*.—S. C. 1. Peer. Wms. 140. S. C. 2. Eq. Abr. 5. 722. S. C. Reg. Lib. A. 1710. fol. 600. 15. Vin. Abr. 348.—See Watson on Partnership, 442.

A MASTER OF A SHIP went a trading voyage beyond sea. The succeeding master opened the effects of the deceased, in the presence of the crew, and then sent a letter, with a bond inclosed, to the widow of the deceased, whereby he binds himself to answer to her the sum of three hundred pounds, if the ship arrive safe, the sum the deceased left being two hundred pounds; which was the rate of *respondentia* bonds there. The master trades, and makes three hundred *per cent.* of the money.

The question was, Whether he should be bound to any more than this bond, or answer to the widow the profits of the money made in the way of trade.

THE COUNSEL *for the master* would have resembled it to the case of an executor or trustee, who shall be accountable for the

interest

Brown against Lytton. interest only, and formerly for the money only. It was said also, that if this money had been lost in the way of trade, the master would have been accountable.

The counsel *on the other side*, and Harcourt, *Lord Keeper*, too, thought it differed from the case of an executor, because the ship was to go a trading voyage, and the money was designed to be laid out in trade, and the succeeding master is in effect but a trustee for the representative of the former. And they held, that if he traded with the money as with his own, with care and prudence, and then through any accident the money was lost, he would not be accountable.

[21] * It was therefore decreed, that he should account to the widow for the profit made by the trade, deducting reasonable allowance for labour and skill.

Harcourt, *Lord Keeper*, thought this resolution necessary for the encouragement of trade; it being a comfort to a man to know, that if he should die, the improvement of his effects in the way of trade by the succeeding master, should be for the advantage of his family. If a trustee impowered to put money to interest let the money lie by him, he shall be accountable for interest; and if a trustee trade with the money, he shall be accountable, not for interest only, but for the profit of the trade; because he acts of his own head, and at his own peril, without applying to the court of chancery for direction in disposing of the money.

EASTER TERM,

The Tenth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Justice,*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir Thomas Powys, *Knt.* } *Justices.*
Sir Edward Northey, *Knt. Attorney General,*
Sir Robert Raymond, *Knt. Solicitor General.*

Sadler *against* Daniel. Case 16.

An administrator cannot sue in the spiritual court to recover the intestate's goods wrongfully taken from his possession; but he must bring *trover* at common law.

THE QUESTION was, Whether a man might be sued in the spiritual court for taking away the goods of an intestate from the administrator; or whether a prohibition should not go?

IT WAS RESOLVED there should be *a prohibition*: for when an administrator is made, the power of the ordinary is determined; and there being a complete remedy, at the common law, for the administrator, in an action of *trover*, the party would by this means be doubly harrassed; for an excommunication could never be pleaded in bar of an action of trover. It is difficult to say when this power was first vested in the ordinary, but probably superstition was the cause. However, now, by the statute law, the ordinary must grant administration (*a*), and then his power is determined; and the administrator, when put in by * the ordinary, derives his power not from the ordinary, but from the law. * [22]

(*a*) By statute 31. *Edw.* 3. c. 11. and 21. *Hen.* 8. c. 5.

Bishop

Case 17. Bishop *against* Eagle.

In an action of account by the new against the old churchwardens, and judgment *quòd computent*, the defendants may plead before the auditors that such a sum came to their hands by mistake; that it was not due to the parish; and that they had repaid it to the owner.

S. C. 11. Mod. 186.

THIS was an action of account brought by the present churchwardens against the former ones. The defendants pleaded, that the plaintiffs are no churchwardens; and, on issue joined, a verdict was given for the plaintiffs, and judgment *quòd computent*.

The defendants before the auditors pleaded, that they received such a sum of money, as churchwardens, through a mistake, when none was due to the parish; that perceiving the mistake, they repaid the money.

To this plea the plaintiffs demurred.

IT WAS SAID *for the plaintiffs*, that no plea that would have been a good bar of the action could be pleaded before auditors. It is true, they could not have pleaded *ne unques receiver*; for they did receive, and for the use of the parish; but they might have pleaded it specially, and so shewn that they were not accountable at the time of the bringing the action.

THE COUNSEL *for the defendants* allowed, that no plea which would have been a good one to the action, could be pleaded before the auditors. But here, as "*ne unques receiver*" could be no plea, since they did receive, and received for the use of the parish, so that had they been robbed, or not repaid the money, they must have remained accountable, it is certainly a fair defence, and admitted for true by the demurrer.

POWELL, *Justice*, was of opinion for the plaintiffs, for they might have pleaded this matter specially, though they could not plead "*ne unques receiver*" generally.

PARKER, *Chief Justice*, was of opinion with the defendants. Admitting this to be a good plea before auditors, it will be

*[23] necessary for the churchwardens to plead such a * plea as shews them to be honest men, *viz.* not only that it was paid to them by mistake, but repaid. Whereas, taking it the other way, and to be a good plea in bar, receipt by mistake will be no receipt at all, and it will not be necessary to shew re-payment, but only that the money did not belong to the parish; this therefore inclined him to support the plea as far as possible. Besides, had they paid this money to the parish before the knowledge of this mistake, the parish would have been charged with this money; repayment was therefore an act done in discharge of the parish, and therefore a proper plea before auditors.

PARKER, *Chief Justice*, and POWELL, *Justice*, differed, Whether or not the churchwardens, after payment of the money to the parish, *viz.* the use for which they received it, and this before knowledge of the mistake, could have been charged in an *indebitatus assumpsit* for the money? The former thought they might, the latter that they could not.

There

There was ANOTHER POINT in this case, *viz.* Whether the churchwardens should be allowed their expences, and surplusage, in case their expences out-balanced, &c.

Churchwardens shall be allowed their expences for receiving and paying parish money.

THE COURT was clear that they should; for churchwardens are more than bare receivers; they are in all respects bailiffs. The rule generally taken, that *a bailiff* shall be allowed expences and surplusage in an action of account, but not *a receiver*, holds true only of a bare receiver, and as to him the reason is evident; but where the nature of the thing shews that the receiver must be put to trouble and expence, the rule is false.

Prec. Ch. 42.

TRINITY

TRINITY TERM,

The Tenth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*
Sir Lyttleton Powys, *Knt.* } *Justices.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir Thomas Powys, *Knt.* } *Justices.*
Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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* Whetherborn *against* Wright. Case 18.

In debt on bond, the defendant can only be holden to bail for the real sum due.

1. Salk. 100. Sellon's Pract. 45.

WHERE A DEBT is ten pounds or upwards, by course of the court special bail is required, otherwise not.

Not common, where an action of debt is brought upon a bond of twenty pounds, conditioned for the payment of nine pounds, to hold to bail; for though the penalty, which is the legal debt, exceeds ten pounds, yet the real and equitable debt is less. But upon some particular cases, as where it is to be feared a person will run away, &c. the Court will hold to bail; for the legal debt exceeds ten pounds (*a*).

(*a*) See Kirk *v.* Strickland, Dougl. 449. Willis *v.* Dent, Sellon's Pract. 44.

Templeman *against* Case. Case 19.

To trespass for entering a house and taking goods, the defendant may plead, that he entered in aid of a bailiff, and took the goods of another.

ACTION UPON THE CASE for entering the house and taking the goods of the plaintiff in the said house. The defendant pleads in bar, that he entered in aid of a bailiff who had a writ of execution, and took the goods of another, and not of the plaintiff. The plaintiff demurs.

Upon

Templeman *against* Case.

* Upon the demurrer three points were made:

First, That this plea amounted to no more than the general issue.

Secondly, That this plea was naught, for want of shewing how the goods came there; whether wrongfully or rightfully.

Thirdly, That it is naught, because it is said in assistance, and not by command of the bailiff.

The Court. The plea in bar is good, notwithstanding these exceptions.

As to the first point, a possessory right is sufficient to maintain an action of *trespass* or *case*, though not a *replevin*; and upon *not guilty* pleaded, this given in evidence, that they took another man's goods, and not the goods of the plaintiff, would not have maintained such a general plea; because, though the goods should not in reality be the plaintiff's, yet being in his house and possession, they are so far his as to maintain this action.

As to the second point, it is impossible for the defendant to shew how.

As to the third point, the command or desire of the bailiff is not necessary; for every one not only may, but is by law bound to give their assistance to officers in execution of justice.

Case 20.

Petworth Parish.

An order of removal is conclusive against every parish, as to all antecedent settlements.

S. C. 1. Sett. Cases, 27.

On a motion to quash an order of justices three exceptions were taken:

First, That there was a former order from the parish of *A.* to that of *Petworth*; and this order being affirmed upon an appeal to the sessions, it was final not only between the parishes that were parties, but all others, except a subsequent settlement could be found out; that therefore this order, which was to remove one *William Pack* and *Katharine* his wife, together with their children, from *Petworth* to *Ringmore*, should be quashed.

* [26]

Mod. Cases in Law and Equity, 327.

* Second exception, That the ages of the children not appearing, they may have gained a subsequent settlement.

Third exception, There is no adjudication that the party has become chargeable, but only that he is likely to become chargeable.

The Court. The first and second exceptions are good; the first is a point lately settled; but as to the last, the order is good notwithstanding.

Case 21.

Player *against* Bandy.

In debt on bond, the plaintiff shall have costs, though a tender was made before the action was brought.

Resolved, that in an action of debt upon a bond, though the money be tendered before action brought, which is refused, that yet the plaintiff must have costs; for the statute 4. & 5. *Anne*,

c. 16. for the amendment of the law, gives the Court no jurisdiction until after action brought, and therefore they cannot take notice of a tender before.

PLAYER against BANDY.

Besides, it was said by POWELL, *Justice*, and contradicted by none, that that statute had enabled the defendant to plead payment, or to bring the money into court, but not to plead tender, refusal, and *encore prist*.

The Queen *against* Mathews. Case 22.

A conviction on 5. *Anne*, c. 14. for killing game, must negatively state the qualifications mentioned in the 22. & 23. *Car.* 2. c 25.

THIS was a conviction upon the statute of 4. & 5. *Anne*, c. 14. for the preservation of the game.

Two exceptions were taken:

FIRST, That the charge setting forth that the defendant *Mathews*, not being a person so and so qualified, and enumerating distinctly the several qualifications in the statute 22. & 23. *Car*. 2. c. 25. for the preservation of the game, omitted a new qualification allowed by this act, *viz*. that he was not a person authorized by a lord or lady of a manor to kill game for their use.

THE COURT was of opinion, that had it been laid generally thus, "that he, not being a person qualified according to law," it had been enough; but the qualifications being distinctly and severally mentioned, the omission of one is fatal (*a*). [27]

A person cannot be convicted on 4. & 5. *Anne*, c 14. in more than one penalty on the same day.

SECONDLY, That the person was here charged with so many five pounds as he killed hares in the same day, * whereas the offence in the statute was the keeping of dogs, engines, &c. not killing hares.

THE COURT was of opinion, that the offence for which the statute gave the forfeiture, was the keeping of dogs and engines, not killing the hares. If a man not qualified go a hunting, and kill never so many hares upon the same day, he would forfeit but one five pounds, for it is but one offence. But if a man keep dogs, and go a hunting several days, and kill hares; if it had been thus laid, "that he, on such a day, kept dogs and killed, "&c." and then again such a day; by laying it thus severally, the offence is severed, and he shall forfeit five pounds for each offence (*b*).

Adjournatur.

(*a*) It is now fully established, that this general mode of stating the want of the qualifications mentioned in these statutes is not sufficient, Rex *v*. Marriott, 1. Stra. 66. Rex *v*. John Hill, Ld. Raym. 1415.; and that in *a conviction* on these statutes the qualifications must be all negatively set out, Rex *v*. Jarvis, 1. Burr. 148.; Rex *v*. Wheatman, Dougl. 331. But a general averment that the defendant was not qualified is sufficient in *an action*, Bluet *Qui Tam v*. Nead, Comy. Rep. 525; and in a conviction on statutes where the informer need not negative any of the exceptions, if he negative some of them only, yet the conviction is good, Rex *v*. Hall, 1. Term Rep. 320.

(*b*) See Rex *v*. Gage, Stra. 546. Crepps *v*. Durden, Cowp. 640.

Case 23. Michell *against* Reynolds.

A bond conditioned for restraining a man from the exercise of his trade for a certain time, and in a certain place, when entered into upon a fair and reasonable consideration is good.

S. C. post. 85. 130.

AN ACTION OF DEBT was brought upon a bond, the condition whereof was, that "whereas *A.* had taken the shop of *B.* "who was a baker, for the term of so many years, and had given "*B.* so much money for it; the condition of this obligation was "such, that if during those years *B.* should not exercise the trade "of a baker within the parish where the shop was, that then the "bond should be void, otherwise, &c."

The question was, Whether this bond was good, or not?

IT WAS ARGUED, that the bond was good. In the case of *Clerk v. The Taylors of Exeter* (*a*), there is, it must be confessed, a difference taken between a bond and a promise; and it * is said, that *a bond* in this case would be void, but a promise good; and in other cases quoted in that case, as in the case of *Broad v. Jolliffe* (*b*), this difference is warranted. The reasons assigned for this difference are two: FIRST, Because in a bond the jury cannot mitigate the damages, but must give the whole penalty, be the damage to the other by setting up the trade ever so small. The second reason is, that the public interest is concerned to promote and encourage trade; and therefore such a condition is against the public interest, against MAGNA CHARTA, and *malum in se*, and therefore the bond void. As to the first of these reasons, it holds against all bonds in general, as well as this. Besides, the difference is not true; for even in a promise, if it be certain, it was said, that the jury have no discretionary power in giving damages. As to the second it was answered, that how prejudicial soever to the public a general and absolute restraint of a man from his trade may be, certainly a particular restraint, limited to one place only, as the present case is, can be none at all; for how is the public concerned whether a man exercises his trade in *Holborn* or in *the Strand*? There is a great difference between the opinion of the Court upon matters before them, and what is said *obiter*, and collateral to the case in question; and this case has never been judicially determined: but if such opinions are of weight, in the case of *Thompson v. Harvey* (*c*), there is a difference taken between a bond where the condition is a general restraint, and where it is a particular one. The bond there is adjudged to be void, because it is a general restraint from the exercise of a man's trade; but there it was admitted to be good, had it been, as here it is, only a restraint in a particular place. As to the reason of the thing in general, there may certainly be a very good reason for the making of such bonds. Suppose a gentleman has a noisy stinking trade near him, he may be willing to give him a * valuable consideration for removing further off. Suppose a man give his apprentice such a sum of money, provided he will enter into a bond of such a penalty not to set up

* [28]

S. C. 1. Peer. Wms. 181. S. C. Fort. 296 Cro. Jac. 739. Cro. Eliz. 872. Powel on Contracts, 169.

[29]

(*a*) 3. Lev. 241.
(*b*) Cro. Jac. 596.
(*c*) 2. Show. 2.

within

within ſuch a diſtance: If this bond be adjudged void, what is the conſequence but a mere circuit of action, *viz.* the forcing of him to bring an action upon the promiſe, and give this bond in evidence.

MICHELL *against* REYNOLDS.

To prove the bond void, the difference taken in the Books between a bond and a promiſe was ſtrongly inſiſted upon; and the caſe of *Clerk v. The Taylors of Exeter (a)*, where the aforeſaid difference is taken, was backed by other authorities, *viz. Moore*, 115. 242. 3. *Leonard*, 217. *Marſh*, 191. One reaſon more was offered, not taken notice of in the Books, that the allowing of ſuch bonds might be a means of introducing monopolies.

POWELL, *Juſtice.* Where an action is brought upon an *aſſumpſit*, though the promiſe be never ſo certain, the jury may mitigate the damages, and give what ſum they pleaſe. Many are the authorities that maintain the difference between a bond and a promiſe; no bond was ever yet adjudged good that reſtrained a man from the exerciſe of his trade: and he was of opinion, that the bond was void.

PARKER, *Chief Juſtice.* I never yet knew ſuch a bond adjudged void. The caſe of *Broad v. Jolliffe (c)* is the leading caſe, as to the difference between *a bond* and *a promiſe*; and the difference itſelf ſuppoſes the condition lawful; and moſt certainly there may be many good reaſons for entering into ſuch a bond. I know of no caſe, except that of an infant, and that ſtands upon another conſideration, where a promiſe ſhall be good, and a bond entered into for the performance of that promiſe void. It is ſomething extraordinary, that a court of juſtice ſhould endeavour to render the breach of a juſt and fair promiſe as eaſy as poſſible; for that would be all the conſequence of our * judgment, ſhould we adjudge the bond void; for if the plaintiff ſhould fail in this action, he may yet have recourſe to an action upon the promiſe, and give the bond in evidence of it. And as for the reaſon given for the difference between a bond and a promiſe, there is this to be ſaid againſt it, that as a jury may give leſs than the penalty, ſo they may give more. Now ſuppoſe it were my intention to bind myſelf in ſuch a penalty, not a very great one, not to uſe my trade nigh ſuch a perſon, with deſign, that if I ſhould afterwards think that the uſe of my trade would be of more advantage to me than the penalty, it ſhould be at my election, is it reaſonable that a jury, contrary to my declared intention in writing, ſhould have it in their power to give twice the penalty, if they think fit, or the other party is ſo much dammified by my breach of promiſe?

* [30]

EYRE, *Juſtice*, of the ſame opinion with PARKER, *Chief Juſtice.*

(a) 3 Lev. 241 (c) Cro. Jac. 596.

 Adjournatur.

MITCHELL *against* REYNOLDS.

Adjournatur (*a*).

(*a*) This case was argued again in Hilary Term, 11. *Anne*, but the Judges retained the same opinion, S. C. post 86.; and in the Hilary Term following PARKER, *Chief Justice*, delivered the resolution of the Court, that the bond was good, S. C. post. 130. because the special consideration on which it was given was set down in the condition, S. C. Fort. 296. S. C. 1. Peer Wms. 181.—See also Chesman *v.* Nainby, 2. Stra. 739. 3. Bro. P. C. 349.

Case 24. Lure *against* Rest.

Delay of the Court ought not to prejudice suitors.

AFTER A WRIT OF INQUIRY executed, and before entry of the judgment, which was delayed by the act of the Court, the plaintiff died.

It was moved that, this happening by the delay of the Court, judgment might be entered as of two or three Terms ago.

In behalf of the motion was cited the case of *Philip v. Jackson*, where it is said, that if the Court delay the entry of the judgment, there judgment may be entered as of two or three Terms ago, without entering continuances.

*[31]

Case 25. * Thomlinson *against* Dighton.

If a tenant in fee demise the land to his wife for life, to dispose of according to her pleasure, provided it be to some one of the testator's children, the wife takes an estate for life; and if the devisor leave behind him a son and daughter, and the wife marries again, and by lease and release, and fine levied, covenants to stand seised to the use of herself for life, without impeachment of waste, remainder to her daughter by her first husband in tail; the power is well executed. S. C. post. 71.—S. C. 1. Salk. 239. S. C. 2. Eq. Abr. 309. S. C. 1. Peer. Wms. 149. S. C. Comy. Rep. 194. S. C. Powel on Powers, 9. 32. 55.

THIS was a writ of error upon a judgment in the court of common pleas in an ejectment.

The case was this:

A tenant in fee of the lands in question devised the lands to his wife for life, then to dispose of according to her pleasure, provided it were to some one of the testator's children. The husband, the devisor, died, and left behind him a son and a daughter; the wife married again; then the wife, by lease, release, and fine levied, covenanted to stand seised, to the use of herself for life, without impeachment of waste, remainder to her daughter by her first husband in tail.

The question was, Whether this conveyance of the lands was a good execution of the power, so that they should go to the daughter; or else, being bad, to the heir at law, *viz.* the son?

The court of common pleas gave judgment for the daughter: a writ of error was brought into the king's Bench.

LUTWYCHE *for the plaintiff in error.* The points considerable in this case are two: First, What estate the wife takes by the devise, whether an estate for life or in fee. Secondly, Whether the power be well executed.

As

As to THE FIRST POINT it is clear, that ſhe has but an eſtate for life; for it is expreſsly deviſed to her for life. And though the words following be, "to diſpoſe of according to her will and "pleaſure, provided it be to any of her children by the teſtator," theſe words give her but a naked power and authority, and no intereſt, as was reſolved in the caſe of *Daniel v. Uply* (*a*), where the deviſe was "to the wife, to diſpoſe to which of the children ſhe "pleaſed." But the principal caſe is here much ſtronger, for it is in expreſs words deviſed to the wife for life, *et quoties in verbis nulla ambiguitas*, &c. (*b*).

As to THE SECOND POINT, Whether the power was well executed? It is true, that there are caſes where the conveyance ſhall take effect by way of covenant to ſtand ſeiſed, when it can no other way elſe whatever (*c*): ſo is the caſe of *Croſſing v. Scudamore* (*d*), and other caſes there cited, as reported by *Ventris*; but there it is ſaid (*e*), that where there is a tranſmutation of the poſſeſſion, there the eſtate ſhall never paſs by way of covenant to ſtand ſeiſed. This is a very improper ſort of conveyance, for here the eſtate is conveyed by leaſe, releaſe, and fine, acts not proper for tenant for life. It is a rule, that a power and authority ought to be ſtrictly purſued; and in *Co. Litt.* there is this difference taken, that if a perſon authorized do leſs than his authority warrants him, it is void; but if he exceed it, it ſhall be good for as much as falls within the power, and the reſt ſhall be but ſurpluſage: now here the power is to give in fee, but is executed only in tail. By the method of the conveyance, it is very plain that the intention of the wife was to paſs the eſtate as owner, and not by virtue of the power; and the rather, becauſe the wife is here poſſeſſed of an eſtate, *viz.* an eſtate for life: beſides, the eſtate paſſes by the fine.

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* PEERE WILLIAMS *for the defendant* argued, that by this deviſe the wife took an eſtate in fee. Had the deviſe been only thus, "to the wife, to diſpoſe of at pleaſure," it had been very plain that ſhe had had a fee-ſimple (*f*); then the words after added, "provided ſhe diſpoſe of it to ſome of the teſtator's children," make it a conditional fee-ſimple: it was ſo reſolved in the caſe of *Daniel v. Uply* (*g*). But being put in mind that in this caſe it was expreſsly deviſed for life, he gave up this point.

But then admitting the wife to have but an eſtate for life, he argued, FIRST, That the woman's marriage was no ſuſpenſion of the power; SECONDLY, That the power was ſufficiently, though improperly executed.—FIRST, That the ſecond marriage was no ſuſpenſion of the power, he proved from the caſe of *Daniel v.*

(*a*) Latch, 9. 39. 134. Noy, 80. 1. Jones, 137.

(*b*) 3. Leon. 71.

(*c*) See the arguments on this point of law in the caſe of Tatlock v. Harris, 3 Term Rep. 181. Gibſon v. Mind, 1 H. Bl. Rep. 569.

(*d*) 2. Lev. 9. 1. Vent. 137. 1. Mod. 175.

(*e*) 2. Vent. 318. 1. Sid. 25. 1. Roll. 329.

(*f*) Co. Lit. 113 Daliſon, 8.

(*g*) 1. Jones, 137.

Upton,

TROMLINSON *against* DIGHTON.

Upton (*a*), where the case is, A man devises that his wife shall sell his land; the husband dies; the wife marries; and resolved, that the wife might not only sell the land, but even sell it to her second husband, which is a much stronger case than the present.— SECONDLY, That this was a good, though improper, execution of the power. Judges are said to be *astuti* to do right; and therefore this power, instead of a strict interpretation, ought to have a large and extensive one; so that any writing whatever that is but enough to signify the intention of the parties, where the power is so general, and no particular way of execution is prescribed, will be enough; and if so, then certainly the power is well executed. For a deed of lease and release is a sufficient declaration of her mind; and as for her estate being limited without impeachment of waste, that shall be rejected as surplusage, which, even in pleading, *non nocet*. As for the objection, that the method of this conveyance seemed as if she designed it as owner of the land,

[34]

and the rather here, because she was seised of an * estate for life, he answered, that there is a difference between a person's having such an estate as will enable him to make such a conveyance, for there it shall operate by way of gift as from an owner; but where a man has not such an estate as will enable him to make such a conveyance, the deed shall operate by way of execution of the power, and so is *Sir Edward Cleer's Case* (*b*). And though there be no recital of the power, yet if the grant cannot work without the power, it shall with it. But here the deed of lease and release recites the power, which carries in it the highest presumption of the intention of the parties that it should so operate; which makes it a much stronger case. And then if it operate as *an appointment*, the estate shall not pass from the trustee, but the appointee shall be in from the will. The grand intention of the parties is the passing of the estate, and not the how or manner in which this is done, whether by virtue of the power, or by deed of lease and release, &c.; and the Court will be more solicitous to uphold the primary intention of the parties, than that which is only a secondary one: without doubt they will never adhere to the latter, to the destruction of the former; and therefore, though the intention of the parties were to pass the land by lease, release, and fine, yet when it cannot pass so, it shall as an execution of the power; *quum quod ago, non valet ut ago, valeat quantum valere potest* (*c*). 1. *Jones*, 392. *Stapleton's Case*. 1. *Ventris*, *King* v. *Melling*. The case of *Gier* v. *Offiter*, 1706, is full in point; and though it be but the opinion of a single Judge at an assize, yet it being the opinion of so great a man as the late *Lord Chief Justice* HOLT, it may be of some weight. That case was shortly thus: A man by will was made tenant for life, with a power to jointure or settle upon his wife; and though the conveyance was there, as here, by lease and release, yet that Judge was of opinion, that it

(*a*) 1. Roll. 329.

(*b*)

(*c*) The case of Osman v. Sheafe, 3. Lev 372.

was

THOMLINSON *against* DIGHTON.

was a good execution of the power. Now in that case, * the same objections might have been made as here, and with equal force; for if it be said here, that the estate passes by virtue of the fine, it may be answered, that if a lease and release shall operate as an execution of the power, and signify no more than the declaration of the intention of the parties, then will the appointee be in by virtue of the power in the will, precedent to the fine, and the fine being subsequent will signify nothing. In the case of *Herring v. Brown* (a), it was resolved, that where the fine is precedent to the deed, that there it is an extinguishment of the power; but if it had been subsequent, as here it is, the power would have been well executed, notwithstanding the fine; and in the exchequer-chamber it was resolved to be good, even though the fine were precedent. As for the objection, that the power is to dispose in fee, and executed only in tail, there is nothing in it; more implies less. A power to pass an estate in fee is most certainly sufficient for passing an estate-tail.

POWELL, *Justice.* The main question of the case is, Whether the power be well executed? A *feoffment* to a man's own son shall operate as a *covenant to stand seised*, rather than the intention of the parties should be frustrated. *Sir Edward Cleer's Case* is express, that where it can pass no other way than by virtue of the power, it shall pass that way, though the intention of the parties were, that it should pass another. And as for her own estate being limited without impeachment of waste, as to the impeachment of waste it shall be void, because it exceeds the power: the intention of the parties is plain: and he was of opinion for the defendant.

PARKER, *Chief Justice.* In *Sir Edward Cleer's Case* it was resolved, that where, according to the way the parties intended, the conveyance would have no effect at all, that there it should pass another way; but where, * should the estate pass the way the parties intended, the conveyance would have some effect, though not all that was intended by the parties, there it should pass no other way than the parties designed. But this point since has been carried much farther; as that, where it would have some effect, but not all intended by the parties, there, to the end that the main design of the parties may be observed, the estate shall pass in another way than the parties intended. For example: Suppose a woman seised of an estate for life, with a power to make a lease for three lives, or twenty-one years; she marries; and then she and her husband join in making the lease, and the husband and wife both die before the lease is expired; here, though the husband in right of his wife, and she in her own, are possessed of an estate for life, and therefore can as owners make a lease, and there appears no intention of the parties (imagining perhaps that they should have outlived the lease) that this lease should be made by virtue of the power; yet because the lease, supposing it made by them as owners, cannot [36]

(a) 1. Vent. 368.

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have all the effect the parties intended, for some it would have, *viz.* it would be a good lease during the lives of the husband and wife, yet because it cannot have all, it shall be esteemed made by virtue of the power: but in the present case the conveyance, as intended by the parties, would be wholly void.

THE COURT was of opinion for the defendant, and that the judgment in the court of common pleas must be affirmed *(a)*.

(*a*) See the judgment of the Court, post. 71. And Dormer *v.* Thurland, 2. Peer. Wms. 506. Bramhall *v.* Hall, Amb. 467. Wright *v.* Englefield, Amb. 468. Darlington *v.* Pultney, Cowp. 260. Sprange *v.* Barnard, 2. Brown's Cases Ch. 585.

TRINITY

TRINITY TERM,

The Tenth of Queen Anne,

IN

The Queen's Bench,

AT

The Sittings at The Guildhall of London,

BEFORE

Sir Thomas Parker, *Knt. Chief Justice.*

Louviere *against* Laubray, Case 26.

AT NISI PRIUS, in the court of queen's bench, *London*, the case happened to be this; If a bill be protested for non-payment, and afterwards indorsed to the *drawer*, he may maintain an action as *indorsee*.

Louviere used to furnish *Laubray* with great quantities of stockings: *Louviere* drew a bill upon *Laubray*, payable to such a one: *Laubray* accepted the bill, but some time after protested it. Upon this the bill was indorsed to *Louviere* the drawer, who brought an action as indorsee.

* The question was, Whether *the drawer* of a bill could maintain an action as *indorsee*? *[37]

PARKER, *Chief Justice*, was of opinion, that upon evidence given to the Court that there were effects of *Louviere* in the hands of *Laubray* enough to answer the bill, and that consequently the acceptance of the bill was not upon the *honour of the drawer*, the action was well brought. For when a merchant draws a bill upon his correspondent, who accepts it, this is payment, for it makes him debtor to another person, who may bring his action. This therefore is such a payment as may be set off upon a former account, and

LOUVIERE *against* LAUBRAY.

and pleaded in bar of such an action; but if there were no effects, then the action would not lie; for it would have been an acceptance *upon honour* only, and the money would be recovered only to be recovered again (*a*).

NOTE, Interest ruled to be paid from the time of the protest (*b*).

(*a*) See Simmonds *v.* Parminter, 1. Wils. 185. and Beck *v.* Robley, H. Bl. Rep. 89. *notis.*

(*b*) See 2. Burr. 1086. and the case of Harris *v.* Benson, 2. Stra. 910. Auriol *v.* Thomas, 2. Term Rep. 52.

Case 27.

Osway *against* Bristow.

To trespass for taking cows in the plaintiff's close, a plea that they were taken *damage feasant* in the defendant's close is good, though no title to the land is shewn.

AN ACTION OF TRESPASS for taking cows in the plaintiff's close.

The defendant pleaded in bar, that they were *damage feasant* "*in clauso suo.*"

The plaintiff demurred, because he set forth no title to the close.

IT WAS RESOLVED that it was well without it; for a possessory right is sufficient to maintain an action of trespass. And this difference was taken, That where the defendant justifies to a place specially laid down in the declaration, there a title must be shewn; but where no place is specially laid down, as here there is none, there he need not.

MICHAELMAS

MICHAELMAS TERM,

The Tenth of Queen Anne,

IN

The Court of Chancery.

Sir Simon Harcourt, *Knt. Lord Keeper.*
Sir John Trevor, *Knt. Master of the Rolls.*

Lingen *against* Souroy. Case 28.

If a man by marriage-articles agree to invest a certain sum of money in land to the use of his wife, and devise land to his nephews without having made the investment, the land shall pass to the wife in pursuance of the agreement.

S. C. 2. Eq. Abr. 327.
S. C. Gilb. Eq. Rep. 91.
S. C. 1. Peer. Wms. 172.

A MAN marries a wife worth seven hundred pounds, and binds himself by marriage-articles to invest fourteen hundred pounds in land to such and such uses, *viz.* to himself for life, remainder to the heirs of their bodies begotten, the remainder to his right heirs. The husband dies, the marriage-articles unperformed, and by his will devises a house, value fifteen pounds a-year, to the wife, and ninety pounds a-year to his nephews, having no children; then comes the clause in his will, "and all my other lands in *York*, or any other part of *Great* "*Britain*, I leave to my nephews."

The question was, Whether the fourteen hundred pounds, though not actually invested in land, should, notwithstanding, in equity, be deemed land, so as to pass by the word "land" in the will, saving to the wife her interest for life? or, Whether it should go with the personal estate?

The wife being executor contended, that it should be looked upon as personal estate, because then she should come in for a share in the surplus unexhausted by debts or legacies.

THE COURT did nothing in the affair, but ordered a reference to THE MASTER to state the matters of fact.

But HARCOURT, *Lord Keeper*, declared it to be his present opinion, that where there is such a marriage-agreement for so much money to be laid out in land, that the money, in case the husband died the agreement unperformed, should, in equity, be esteemed land,

LINGEN *against* SOUROY.

land, and may be devised as such, subject, in the first place, to the uses declared in the marriage-settlement *(a)*.

(*a*) See Lingen *v* Souroy, Gilb Eq Rep 91. S. C 1 Peer Wms 175 Edwards *v* Warwick, 2 Peer Wms 371 Guidot *v*. Guidot, 3 Atk 254 Pultney *v* Darlington, 1 Brown's Cases Ch 223 Rashleigh *v* Master, 3 Brown's Cases Ch 99 Brown *v*. De Laet, 4 Brown's Cases Ch 527

MICHAELMAS TERM,

The Tenth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir Thomas Powys, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

* Rumball *against* Ball. Case 29.

ACTION OF DEBT upon a note to this effect: "I ACKNOWLEDGE myself indebted to such a one so much, "which I promise to pay upon demand."

In debt on a note, payable on demand, it is not necessary to alledge *a demand* in the declaration.

It was moved *in arrest of judgment*, that though upon a note acknowledging a debt it was not necessary to alledge *a demand*; yet where it is part of the agreement, there a demand is necessary.

Dougl. 679. 1. Term Rep. 713.

But THE COURT was of another opinion, for it is a debt *in præsenti*; and the words "promise to pay" import no more than that I am ready to pay the money at any time, and shall not restrain or qualify the other words, this being no debt arising upon the performance of a certain condition, but a debt plainly precedent to the demand. Besides, supposing the demand necessary, the action itself, perhaps, is a demand.

Harvey

Case 30. *** Harvey *against* Wright.**

If a cause has not been proceeded in for four Terms, a whole Term must intervene between *the notice and the trial.*

Impey, 3d edit. 309.
Stra. 1164.
Sellon's Pract. 407.
3. Term Rep. 530.

THERE was this question raised concerning understanding a rule of court (*a*).

The rule was, that if a cause was not at all prosecuted in four Terms, neither party could revive process, without giving the other a Term's notice.

The question was, Whether notice at any time within the Term, as *e. g.* the last day of the Term, would satisfy the rule? or, Whether the rule does not require a whole Term's notice?

THE COURT, upon time taken to consult the rest of the Judges, that all the courts might be uniform in their practice, delivered their opinion, that by a Term's notice was meant that a whole Term should intervene between notice and trial, that so either of the parties may have time and opportunity to apply to this court. In the courts of common pleas and exchequer, where they had the same rule in so many words, it was so understood.

(*a*) The rule was made in the fourth year of *Queen Anne*.

Case 31. *** Lord Say and Seal's Case.**

An attorney who is employed in suffering a common recovery is not privileged from giving evidence of the day on which the deeds were executed.

Bull N. P. 284.
Cowp. 845.
2. Stra. 1122.
3. Burr. 1687.
4. Term Rep. 481. 753. 760.

UPON A TRIAL AT BAR in the court of king's bench, in an ejectment brought by the heirs at law against the *Lord Say and Seal*, who claimed as heir in tail;

The single question was, Whether or no a *common recovery* that was suffered in order to dock the intail, was good or not?

The objection to the recovery was, that there was no tenant to the *præcipe*.

To prove the recovery good, a deed bearing date the twenty-third of *October* 1701, directing the uses of the recovery, and the fine, *viz.* the chirograph of the fine, and common recovery, were produced.

THE COUNSEL for the *Lord Say and Seal* desired to call one *Knight*, an attorney at law, to prove, that though * the deed was dated the twenty-third of *October*, it was not executed until five months after, *viz.* in *March*. *N. B.* The attorney was the person intrusted in suffering the common recovery.

*[41]

THE COUNSEL *for the heirs at law* opposed the swearing the attorney, because as an attorney has a privilege not to be examined as to the secrets of his client's cause, so the attorney's privilege was likewise the client's privilege; for the client intrusts an attorney with the secrets of his cause, upon confidence not only that he will not, but also that though he would yet he should not, be admitted by the law to betray his client; and for this *Holbeche's*

Case

Case (*a*) was relied upon. Besides, it was said that his evidence would tend to accuse himself either of ignorance, negligence, or something worse; and in *Moore's Reports*, antedating deeds is felony.

LORD SAY AND SEAL'S CASE.

THE COURT were of opinion, that *Holbeche's Case* was good law; and that an attorney's privilege was the privilege of his client; and that an attorney, though he would yet should not be allowed to discover the secrets of his client (*b*). But notwithstanding this, they thought *Knight*'s evidence was to be received; for that a thing of such a nature as the time of executing a deed could not be called the secret of his client, that it was a thing he might come to the knowledge of without his client's acquainting him, and was of that nature, that an attorney concerned, or anybody else, might inform the Court of (*c*).

Parol evidence shall not be admitted to contradict the chirograph of a fine.

Knight being called in, swore, that it being feared the common recovery would be good for nothing, because it was doubted whether there was a good tenant to the *præcipe*, at the time of the common recovery suffered, it was agreed upon as the best expedient, that there should be a fine as of *Sancti Michaelis* levied to make a tenant to the *præcipe*, which was five months before the * fine was actually levied; and that there should be a deed, which should declare the uses of the fine and recovery, and recite the fine to be of *Sancti Michaelis*; and that the deed was executed when the fine was taken, *viz.* in *March*.

1. Mod. 117.
2. Stra. 1267.

* [42]

The *chirograph* of the fine was then produced, according to which the fine was levied as of *Michaelmas Term*; and if so, without controversy there was a tenant to the *præcipe*, and so all was well.

THE COUNSEL for *Lord Say* confessed, that the chirograph of a fine was *prima facie* good evidence; that it was an evidence of so high a nature, as that no parol evidence should be allowed to falsify it; but they said it might by matter of record. To clear the way, they mentioned the clause in the statute 5. *Hen.* 4. *Stat.* 28. that orders the enrolment of fines, and that of 23. *Eliz.* c. 3. which directs, that the date of the concord should be certified by the Judge before whom the fine was levied.

See Cruise on Fines, 43.

Then they said, that *the concord* of the fine was certified by *Lord Chief Justice* TREVOR to be taken upon the second day of *March*; and this evidence being an evidence of record, they offered to falsify *the chirograph*.

BUT TO THIS *it was objected*, that the chirograph of a fine was a record of so high a nature, that unless it be void, and not only voidable, it cannot be vacated by any evidence whatsoever, but by

(*a*) Rex *v.* Dixon, 3 Burr. 1687. Cobden *v.* Kendrick, 4. Term. Rep. 431. Wilson *v.* Rastall, 4 Term Rep. 753.

(*b*) Lindsay *v.* Talbot, Bull. N. P. 284.

(*c*) See Doe *v.* Andrews, Cowp. 845

writ

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writ of error only. And that it was not a nullity and void, they cited 2. *Ventris*, 47. and *Hobart*, 330. where *A.* and his wife acknowledged the note of a fine the twenty-sixth day of *March*, before commissioners, by *dedimus potestatem*; the wife died the twenty-seventh of the same month; the twenty-eighth composition was made in the alienation-office, upon a writ of covenant returnable in *Hilary Term* before, and the king's silver was entered as of

* [43] the same *Hilary Term*; and * this fine, upon debate, was resolved to be good. In the case of *Argenton v. Westover* (a), where it appeared by the record, that the caption of the conuzance of the fine was the twenty-seventh of *March*, and the writ of covenant and *dedimus potestatem* were dated the ninth of *April*, and it was, in a writ of error to reverse the fine, objected, that the conuzance was taken without any warrant, and that by 23. *Eliz.* c. 3. the caption was always to be certified, the Court over-ruled this exception, and would not hear it argued, because it would shake several fines, &c. And it is a common practice, that a fine levied in the Vacation may, at the choice of the parties, be a fine of either the precedent or subsequent Terms, which differs from the case at bar only in this, that here there is an intervening Term; and whether this will occasion such a difference, as that in the one case the fine should be good, in the other not only voidable but void and null, depends upon the practice of the court of common pleas, where this matter should properly have been canvassed. Though a fine presupposes a writ of covenant, yet the common practice is now to levy them without. The case of *Clerk v. Ward* (b) was the only case where a fine was attempted to be destroyed by evidence, and this was in a court of equity, *viz.* the chancery, and yet there it was not suffered; and this opinion was confirmed upon error in the house of lords. As for the statute of 23. *Eliz.* c. 2. it only extends to fines taken by *dedimus*, and only to regulate not annul fines, as the clause (c) of "any attornment, &c." shews, for *exceptio probat regulam in rebus non exceptis.* The statute *De Donis* says, that "such fines shall be *ipso jure* null;" yet this has been interpreted voidable only: and a discontinuance outlawry is said by an act of parliament to be *ipso facto* void, and yet it has been held voidable only by writ of error; and if this construction prevails in an outlawry penal in its nature, *à fortiori* it ought in things so much favoured as fines.

* [44] * THE COUNSEL *for Lord Say* contended the fine to be void by 23. *Eliz.* c. 3.; for if it be interpreted to make fines voidable only, it will help none but those that are intitled to a writ of error; and not remainder-men, who are not so; so that, according to this construction, the act will relieve but half of those it was designed to relieve.

(a) Cro. Eliz. 275.
(b) Prec. Chan. 150. 1. Bro. Cases in Parl. 137.
(c) 23. Eliz. c. 3. f. 5.

PEERE

PEERE WILLIAMS *for the plaintiffs*, the heirs at law, replied to this, that there might be found some cases in law, where the party grieved was without remedy; and instanced in the case of bail, who, though as much grieved by an erroneous judgment as the principal himself, can yet bring no writ of error to reverse it. LORD SAY AND SEAL'S CASE.

THE COURT. It is very harsh doctrine to be laid down in a court of justice, that there may be a wrong without a remedy; especially when the present case requires no such argument; for if *Lord Say* should be wronged by our refusal of this evidence, he has yet a very proper and easy remedy, *viz.* to apply to the court of common pleas to vacate the fine, if in truth it be voidable. It is agreed, by both sides, that it is common practice for a fine levied in Vacation-time to be, at the election of the parties, a fine either of the precedent or subsequent Terms, but according to this doctrine it must be a mere nullity. Whether the intervening of a Term can make such a difference, as that in the one case the fine shall be good, in the other utterly void, cannot be discovered from the reason of the thing, but must depend entirely upon the practice of the court of common pleas; and every court being judge of its own rules, is a plain argument that that is the proper court to relieve. In the case of *Clerk v. Ward (a)*, such kind of evidence was refused even by a court of equity, *viz.* the chancery; and this judgment was confirmed on a writ of error in the house of lords. * As for the acts of parliament mentioned, it seems unreasonable to put such a construction upon them, as that more exceptions should make fines null since those statutes, which were designed to protect and support them, than before. Besides, these statutes extend only to fines taken by *dedimus*; and though now most fines are in fact taken so, yet they are recorded as taken in court, and this to prevent questions about captions. This case is not to be distinguished, in the reason of the thing, from the case of a warrant of attorney to confess judgment, and before judgment confessed the party dies, and judgment is confessed after his death, in which case the judgment can be avoided by error only. While a fine remains a record, intire credit must be given to it. Besides, this evidence, if allowed, will not be conclusive; for it will not follow, that, if there be a caption returned such a day, there was no other taken before; for there may be twenty captions, there may perhaps be another fine really had. If a caption and covenant were of the essence of a fine, they ought to be given in evidence to prove a fine, but this is never done. Common recoveries, although there are no tenants to the *præcipes*, are good by way of *estoppels* against the parties who suffer them, though not against remainder-men, strangers, &c. *[45]

(a) Prec. Ch. 150. 2. Eq. Abr. 474. 1. Brown C. P. 237.

A deed of bargain and sale made thus: "THIS INDENTURE, made between *A.* of the one part, *B.* of the second part, and *C.* of the third part, witnesseth, that for and in consideration of five shillings in hand paid, *hath* granted, &c." is good, although the name of *the grantor* is omitted before the words "hath granted, &c."

After this, there was a deed of *bargain and sale* inrolled produced, which would have made a good tenant to the *præcipe* had the opinion of the Court been against the plaintiffs, as it was for them.

But to this deed this objection was made, that it was a tripartite deed, and ran to this effect: "THIS INDENTURE, made the " day of , between of " the one part, and of the second part, and " of the third part, witnesseth, That for and in " consideration * of the sum of five shillings, to him in hand paid, " hath given and granted, &c." Now here they said the person granting is wanting, "hath granted," without saying who hath granted, and consequently this deed passes nothing, and can therefore make no tenant to the *præcipe*. By way of enforcing this objection it was said, that to make a good deed proper words are requisite; there must be *a grantor* and *a grantee*; and it is not for a court of law to spell out the intention of the parties. If the failure had been of a grantee as it was of a grantor, for example, thus, "IN CONSIDERATION of five shillings paid by *A.* that therefore " *Lord Say* did grant," without saying to whom, nothing most certainly would have passed, where yet the presumption would have been full as strong; and *Haslewood's Case* (*a*) was much relied upon. If the construction of a deed is always to be governed by the intention of the parties, a grant of land to a man "for ever" would convey a fee; and a "grant to a man and his issue" an estate-tail, as well as in a will.

THE COUNSEL *for the plaintiff* replied, that it was not a thing to be doubted but there must be *a grantor* and *a grantee*; but the question was, Whether, though this deed be not as exact in form as it might have been, yet a grantor may not with certainty enough be collected from the whole deed? As to *Haslewood's Case*, VENTRIS was against the judgment; besides, that was a case upon pleading, where forms are more strictly required and adhered to than in deeds; and the case of *Trethewy v. Ellesdon* (*b*) is clear contrary. In the case of *Beniger v. Forgassa* (*c*), there is a collection of cases where names shall be supplied. It is a maxim of law, that a deed shall never be construed void if it can by any means be made good: and what the intent of this deed was, [47] and that * according to that *Lord Say* was grantor, was proved beyond dispute from several parts of the deed. In the case of *Langdon v. Goole* (*d*), a man was bound in an obligation, but it was not said to whom, yet this was supplied by the intention. The case of *Stanhope v. Buller* (*e*) was a case even in pleading. The law will, as much as it can, assist the frailties and infirmities of men in their employments, who, in drawing long deeds, may easily make a slip. The case at bar is the case of a bargain and sale,

(*a*) 2. Vent. 196.
(*b*) 2. Vent. 141.
(*c*) Plowd. Com.
(*d*) 3. Lev. 41.
(*e*) 1. Lutw. 233.

where

where the consideration of money carries so violent an intendment, that a grant to a man upon a valuable consideration, without saying "for his heirs," shall yet give him a fee, which is much stronger than the case at bar, because there without such a construction there would have been a *quid pro quo*, an estate for life, and the grant would not be altogether void, as here it would. Lord Say and Seal's Case.

The Court was of opinion, that the deed was good. Had this been a tripartite deed, without this slip, there had been no doubt at all in the case; but the deed is tripartite, and "hath" in the singular number, and therefore all the doubt is to whom the "hath" refers. Deeds are to be interpreted, as much as possible, according to the intention of the parties. The case of *Haslewood v. Mansfield (a)* was a case upon pleading, where greater strictness is required, and therefore does not come up to the case in point. The case of *Trethewy v. Ellesdon (b)* does. Many are the instances where the penalties of bonds are put into very strange and even false *Latin*, and yet held good *(c)*. The case in question is the case of a bargain and sale, and therefore to be interpreted more favourably than a deed. By the common law, nothing passed by deed of bargain and sale but the use, and the remedy was only in chancery; but now statute-law has passed the estate to the use. The intention of the deed is plain, if this deed do not make *Lord Say* grantor, as to him it would have no effect at all, who yet sealed it. According to the common rules of indenture, the * words of the deed are the words of all the parties, but *Lord Say* is a party, therefore he has granted. * [48]

The truth of the matter was, that it being feared this slip in the deed would be fatal to the recovery, this other contrivance of the fine was judged to be the best way of supporting it.

Though the opinion of the Court was clear and plain for the plaintiffs in both points, yet the *Lord Say and Seal* prayed a bill of exceptions.

(*a*) 2 Vent 196.
(*b*) 2 Vent 141
(*c*) See 1 Salk 462. 3 Salk 74

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By the custom of London, each of the wardmotes is to return four persons to the court of aldermen, out of which the court is to chuse one for alderman of the ward, but if four be chosen at a wardmote, and four other persons returned, the court of king's bench will not grant a *mandamus* to the returning officer to return the four who were elected, but will leave the parties injured to bring an action on the case for a false return.—S. C. Fort 283 Salk 573

THE Court of Queen's Bench was moved for a *mandamus* to be directed to *Sir Gilbert Heathcote*, late Lord Mayor of the city of *London*, to return such and such persons, by name, to the court of aldermen, as the persons chosen by the wardmote of *Broad-Street*, or to shew cause why he would not. *Sir Gilbert Heathcote* had in fact made a return, but a return of different persons (as to three

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of them) than what (the Counsel moving said) appeared upon the scrutiny to have been really chosen.

Arguments *for the mandamus.*

It was said, that they were before a court that had a jurisdiction over all inferior magistrates whatsoever, to compel them to do their duty; that as it would without doubt be proper to apply to this court, should a lord-mayor refuse to hold a court of aldermen, or refuse to make any return, so it was no less proper in the present case, where he makes a false one. If it be objected, that the proper remedy lies in the court of aldermen, the answer is, that the lord-
*[49] mayor presides over that court, *et nemo debet esse * judex in propriâ causâ*; and though it may here be said, that the lord-mayor who made the return is out of his office, yet this in general must be precarious and uncertain; it might have been otherwise; and a legal remedy ought to be certain in all events. If the court of aldermen are the final electors, and have also a power of allowing or disallowing returns, they will have an absolute power of choosing whom they please; whereas, according to the ancient custom and practice, they are only to choose one of the persons returned to them. It is true, the court of aldermen have rejected returns, upon the account of the insufficiency of the persons returned; or where the return has either fallen short, or exceeded the just number, as when five or three have been returned; but not because of its being a false return. But supposing the court of aldermen have a jurisdiction, why may not this court have a concurrent one? It was confessed, that this was an unprecedented *mandamus* that was desired; but then it was said, the reason was, because no lord-mayor before had ever made so bold an attempt upon the liberties and privileges of THE CITY; and as there was no precedent for the *mandamus* desired, so there was no instance to be found in which such a *mandamus* had been denied. Then several cases were quoted (*a*), where the Court, though doubtful whether a *mandamus* lay, had yet granted a *mandamus*, in order to consider further upon the return. And if the Court will act so in cases, comparatively speaking, of a private nature, much more will they do so in offices of a public nature, as that of an alderman of the city of *London*.

Arguments *against the mandamus.*

First, It was said, that the custom, generally, was for the person injured to pray for a *mandamus*, and the words of the writ
*[50] are "*ad damnum* of those that are chosen;" * whereas in this case, the Counsel moving for the *mandamus* are Counsel for THE CITY.

Then it was insisted upon, that there was no occasion for this *mandamus*, for that the lord-mayor was only a ministerial officer, and the court of aldermen were not concluded by this his return. By the custom of the city, founded upon the bye-law of *Henry the*

(*a*) 1. Lev. 121. Duke of Ormond's Case. Dr. Blithe's Case.

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Fourth, they are to chuse one of the persons chosen, not one of those returned.—To prove the authority and power of the court of aldermen over returns, the following instances were produced: On the second day of *November*, in the year 1696, *Sir John Moor* was returned two several times to the court of aldermen, and as often rejected; and the court of aldermen proceeded to a new election themselves, without any more returns; on the thirteenth day of *July*, in the year 1699, they ordered a new return to be made for *divers reasons* only, not saying what; and on the thirtieth day of *January*, in the year 1694, a new return was commanded for disorderly proceedings. In the *Case of Queenhithe*, the record says, "*ideo consideratum est per Curiam*," that this return be rejected; and when five or three have been returned, the court of aldermen have rejected them. If now, such an over-ruling power has been exercised over returns by the court of aldermen, this court will not, certainly, interpose, and deprive the court of aldermen of their right in this matter. The common reason why *mandamus's* concerning fellows of colleges have been refused, *viz.* because their proper remedy was to apply to the visitor, will hold in this case. But supposing the return did conclude the court of aldermen, yet the Court will never grant a *mandamus* in this case, because four are already returned. Should the Court direct a *mandamus* for four more to be returned, such a command would make the lord-mayor subject to actions upon the case for false returns; for one return must necessarily falsify the other, it being impossible that both can be true. * Suppose *Sir Gilbert Heathcote*, in obedience to such a *mandamus*, returns another four, the consequence is, the court of aldermen will have two returns before them; and either they have a right to examine which was the true return, or they have not; if they have not, they can do nothing; if they have, then they may now examine into this present return, and reject it if they see cause. Acceptance is necessary to a return, and this return being already compleat, by acceptance of the court of aldermen, another cannot now be made. * [51*]

Eyre, *Justice*, proposed an objection to this *mandamus* for the consideration of the Counsel. The objection was, that no instance could be produced where obedience to a *mandamus* shall expose a man to any trouble or inconvenience; whereas in this case, if *Sir Gilbert Heathcote* obeys the *mandamus*, he will be liable to an action for a false return to the court of aldermen; but if he returns, that the persons already returned are those that were truly chosen, he will be liable to an action for a false return to the *mandamus*, and afterwards to an action for a false return to the court of aldermen; for the one action and verdict cannot be given in evidence in the other action.

The Counsel *for the mandamus* replied.—As for that objection against the *mandamus*, that the court of aldermen had a power over the return, and that therefore this Court ought not to interpose, any

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more than they will in the case of a fellow of a college, where there is * A VISITOR, they said, the difference taken in the famous case of *Dr. Bury, Bishop of Exeter*, which passed the house of lords, would answer that objection, *viz.* that as to such corporations as were erected for private ends only, the Court would leave these to visitors, and not interpose, as in the case of colleges, &c.; *contra* as to corporations founded upon public *[52] accounts, as for the government of great cities, * &c.; and in the case at bar, the metropolis of the whole kingdom was concerned. They said, it was very unreasonable that the court of aldermen should have an absolute power over returns, and be final electors too; for then, in effect, they have the entire election in themselves, and the liberties of the city are precarious, depending upon the pleasure of the court of aldermen. As for the instances produced, of the power of the court of aldermen over returns, five of them only were insisted upon, and in some of them the returns carried along with them evident marks of error, as where three or five were returned. The rest were instances of such nature as would make one sorry that such a power should be placed in such a court, if so it is, as where they rejected a return "for divers reasons," and another "for disorderly proceedings."

To the objection, that the power of the lord-mayor was already executed, and the return made, it was answered, that the force of this objection only amounted to this, that an officer, because he has done wrong, must not do right; that the first return, if wrong, was a nullity, and no return at all; that this would be an objection against all *mandamus's*; and that by this rule an archdeacon might return to a *mandamus*, that he had sworn in such a one, that his power was executed, and therefore he could not obey the *mandamus*.

To the objection, that this *mandamus* would expose *Sir Gilbert Heathcote* to actions, whether he obeyed it or made a return to it, in which it differed from all other *mandamus's*, it was answered, that if he obeyed the *mandamus*, as he ought if he has already done wrong, that it was his doing wrong, and not his obedience to the *mandamus*, that exposed him to actions; that if he had done right, in case of disobedience to the *mandamus* no action could be successfully brought against him; for that, in these commandatory writs, *[53] there is always an alternative; * "*si ita est*," says one; "*si vobis* "*constare poterit*," says another; and this writ now in debate, "*vel causam nobis significes*;" in all which cases, the first part of the writ is only to be obeyed if true. Some special cases there are wherein officers may be liable to actions merely for executing the process of the law; but in no case can an action be carried on successfully, in case he has behaved impartially. For example, upon a *fieri facias* directed to a sheriff, put the case there are goods, in which, as it often happens, others claim a property; in this case, whether he returns "*fieri feci*" or "*nulla bona*," and one he must, he will be liable to an action. But if it shall appear

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he has acted fairly and indifferently, the law shall secure him, whatever return he makes, and whether his return be true or false. Bonds taken by a sheriff to indemnify him, in such a case, have been held good.

As to that part of the objection, that this distinguishes this case from all other *mandamus's*; they supposed the law to be otherwise, and that should an archdeacon, in obedience to a *mandamus*, swear in a wrong person, he would be liable to an action. 1. *Rolls*, 108. was cited, where it was said, that an action lay against an archdeacon for not inducting a clerk. Instances were urged, wherein the Court, though doubtful, granted *mandamus's*; and it was said that they were better spoken to, and with more certainty upon the return.

Mandamus's founded upon MAGNA CHARTA, *cap.* 29.

The last day of the Term, THE COURT, *viz.* the THREE JUDGES then present, delivered their opinions *seriatim* to the following effect.

EYRE, *Justice.* The question is, Whether the Court ought to grant the *mandamus* desired? The design in asking it, is said to be not so much for the sake of deciding the * present controversy, as to know what remedy the inhabitants of *a ward* have, to be represented by one of the four truly chosen by them, in the court of aldermen. It is agreed, that the wardmote are to choose four and return them to the court of aldermen; and that the court of aldermen are to be the final electors, for they are to choose one of the four. It is agreed, the court of aldermen have quashed returns; sometimes for the number and insufficiency of the persons returned, sometimes for irregularities in the choice. It must likewise be agreed, that this Court has a general jurisdiction in this matter, and is to take care, that public offices be discharged by persons that are duly elected; and that *mandamus's* have been the way whereby this power has been generally executed. I agree, therefore, that unless some *mandamus*, I say some *mandamus*, will lie in this case, there is no remedy; for as for actions upon the case for false returns, they lie only in damages, but can never restore the persons wronged to the possession of their right. It ought to be the concern of a court of justice to take care, that whilst they are granting a remedy to one, they do not at the same time expose others to great inconveniencies; and likewise, that the remedy be such, as may prove effectual. *Bagg's Case* (*a*), and the last *Mandamus Act* (*b*), do not concern the present question; for the former treats of *mandamus's* in general, and the latter only speeds the proceedings upon *mandamus's*, but does not give any new *mandamus*. It is confessed of all hands, that the *mandamus* desired is without a precedent; all *mandamus's* being either to restore persons turned out, or to admit those refused. I say not this, by * [54]

(*a*) 11. Co. 93.

(*b*) 9. *Ann.* c. 20.

way

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way of objection against the *mandamus*; but only to shew, that the reason of other cases must be our guide. The cases quoted have been of *mandamus's* to archdeacons to swear in church-wardens, or to corporations to admit burgesses; but these cases cannot warrant * this *mandamus*, because this is a *mandamus* liable to greater inconveniencies, and less effectual than either of those; for an archdeacon is perfectly safe in obeying a *mandamus* directed to him: but here in the case before us, obedience to this *mandamus*, supposing him to have done right already, will be no defence in an action upon the case for a false return, for it would be of very dangerous consequence that it should: for, first, the persons being named in the *mandamus*, is no evidence of their being chosen, but is barely the suggestion of the party, and, secondly, the consequence would be, that the person who should be so diligent or fortunate as to get the first *mandamus*, whether chosen or not chosen, could not be removed. Though no case has been quoted to shew, and the reason I am sure is because there are none, that an archdeacon swearing in a wrong person, in obedience to a *mandamus*, was liable to an action for so doing; yet it has been attempted to be proved, that in the reason of the thing an action ought to lie; and for this purpose it has been said, that an action will lie against an archdeacon for not admitting, or refusing to swear in, &c. But certainly it does not from hence follow, that obedience to a mandatory writ of this court will subject him to an action. Further yet, this *mandamus* may possibly expose *Sir Gilbert Heathcote* to a double vexation. Suppose he returns that the persons before returned were truly chosen, he will be liable to an action for a false return to the *mandamus*, and likewise to an action for a false return to the court of aldermen, for the evidence given in one action will not be evidence in the other. This objection receives an additional strength from the late *Mandamus Act*, where there is a special clause to secure men from double vexation. But the greatest objection against this *mandamus* is, that it must prove vain and fruitless; whereas in all other cases the *mandamus* is an immediate and effectual remedy, for the court of aldermen cannot be bound * by the proceedings upon this *mandamus*, being strangers to it; and consequently, according to the verdict given upon the trial in a second *mandamus* to the court of aldermen, and without any regard to the trial, proceedings, and verdict upon the first *mandamus*, it is, that the *peremptory mandamus* must go, so that to me it seems to have no effect at all. It is highly proper there should be a remedy; but for these reasons I cannot think this a proper remedy. The *Abingdon Case*, as appears to me, points out the *mandamus* that ought to go in this case. By the constitution of that corporation the freemen were to choose two, and present them to the mayor, aldermen, and burgesses, who were to elect one of them: Now in this case there was a *mandamus* granted to the mayor, aldermen, and burgesses, suggesting that such a one and such a one were the persons chosen, and commanding them to choose one of them. That the court of aldermen are to elect one of the four, chosen

* [55]

[56]

chosen by the wardmote, and not one of them returned by the lord mayor, is very plain from the power by them exercised over returns. Now, therefore, as it appears to me, we should grant a *mandamus* to the court of aldermen, suggesting such four to be chosen, and commanding them to choose one of them. This seems to me not liable to those objections and inconveniencies the other way is attended with, and also answers that objection rationally started, that they are in truth the sole electors. Besides, supposing the court of aldermen have, as is pretended, such a power over returns, they are the properest persons to return their own privileges. As to the objection, that the lord mayor presides in the court of aldermen, and, having a power to adjourn the court at pleasure, may prevent any return ungrateful to him; the answer is, that in so doing he would be guilty of a contempt; and so would the court of aldermen, should they refuse to obey, or return to the *mandamus*.

* Powys, *Justice*. I am of opinion this *mandamus* ought to go. [57] *Bagg's Case (a)* is said to have been the beginning of *mandamus's*; but certainly they are of much greater antiquity. In *Dr. Widdrington's Case (b)* they are said to have been as old as the time of *Edward the Second* and *Edward the Third*. There have been positive affidavits read of misbehaviour, which is ground enough for us to look into it. My Brother Eyre has owned, that there is no way of coming at this matter but by a *mandamus*. I cannot see of what use a *mandamus* directed to the court of aldermen would be; for they can do nothing upon such a *mandamus*; the persons not coming before them in a legal way, *viz* by the return of the lord mayor. Besides, to grant a *mandamus* at first to the court of aldermen, would be to proceed *per saltum*, neglecting the proper degrees to be observed in this matter. But it is objected, that an application to the court of aldermen is the proper remedy: I answer no; for that would be to appeal from the lord mayor to the lord mayor, for he presides in that court, and can hold or adjourn it at pleasure. It is out of that court the lord mayor is chosen, and as every member there lives in expectation of the chair in his turn, that court will consider the privileges of the lord mayor as their own. It seems very unreasonable that the same body of men should be to choose out of the return, and have an absolute power over the return too. There have, indeed, been instances produced of their power over returns, some of which did not come up to the point; and one was of so arbitrary a nature, as was never before practised, nor I hope ever will again. It is objected, that *Sir Gilbert Heathcote* has already executed his power, and would you have him do it over again? A strange objection, where an officer's having done wrong, is used as an argument against his being obliged to do justice! * Suppose mere strangers had been [58] returned; must this have been looked upon as an exercise of his power? No certainly; a false return is no return. Would it be

(a) 11. Co. 93. (b) 1 Lev 23.

a good

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a good return for an archdeacon to say, "I have already sworn in a wrong church-warden, therefore I cannot obey the writ?" No, it would not. *Mandamus's* are never peremptory; but have always a disjunctive, "*vel causam nobis significes.*" If he has made a return, and a true return, he may return *non electi*; but if these men are really chosen, it is absolutely necessary for them to be returned; since that is the only legal way by which they can be brought before the court of aldermen. It is objected, that this *mandamus* will be ineffectual; I say no; for it will have its proper effect; which is not that these men should be aldermen, but put in a capacity of being so, by being returned. As to *Sir Gilbert Heathcote's* being exposed to actions, nay to double vexation, that is not to be put in the scales with the peace and quiet of the City. In the next place, no action can be brought against him successfully, in case he has done right. And in case of double vexation, the damages a jury would give upon such a second trial, after the merits had been fairly tried before, would be inconsiderable. But it is objected, that the *mandamus* desired, differs from all others; they being either to admit or restore, but this for a possibility only: I say not; for it is for a nomination. Thus much of the *mandamus's* lying *de jure*. But now supposing it doubtful, yet I think we ought to grant it. Many are the instances where this Court have granted *mandamus's* in doubtful cases; as to the treasurer of the *New River* water (*a*), to fellow of a college (*b*). All cases of *mandamus's* are granted *hæsitante curiâ* (*c*); and the ground they went upon was this, that it would be better spoken to upon the return. Now, if this Court has acted thus, in matters of an inferior nature; [59] *à fortiori* will it do so in a case of * this importance. The return of *Sir Gilbert Heathcote* may give some further light in the matter: if we should err in granting this *mandamus*, the error is retrievable; it may be quashed, *erronicè emanavit.* But supposing there is another remedy, that is no objection; for the law in many cases gives a double remedy: as suppose a clause in a will, that whatever controversy shall arise upon the construction of it, shall be decided by such and such arbitrators; the parties will have their election to decide their controversies either by arbitrators, or by law.

Parker, *Chief Justice.* This being a case of consequence, I shall not only give my opinion, but freely declare that which seems to me the best and properest remedy in this affair. Among the instances produced, to prove the power of the court of aldermen over returns, one was their rejecting a return, because the lord mayor, *Sir Samuel Garrard*, had refused a poll. This, I suppose, they did upon a complaint brought before them; which seems to me, in this case, the most proper remedy. The effect of this *mandamus* is, to have such and such returned; the consequence of which will be, the court of aldermen will have seven before them; and then they must consider who the four were that were chosen by

(*a*) 1. Sid. 169. (*b*) 1 Lev. 23. (*c*) 2. Lev. 14.

the

the wardmote, that so they may choose one of them: for unless they do this, there must go another *mandamus* to the court of aldermen; the consequence of which is, that this election may come to be tried twice, *viz.* upon the return of *Sir Gilbert Heathcote* to his *mandamus*, and of the court of aldermen to theirs; so that this way the right may not, possibly, be settled without much expence and length of time. When persons are falsly returned, the proper way is, for the persons grieved to complain to the court of aldermen for redress; and if they refuse, then this Court will grant a *mandamus* to the court of aldermen, * who are the properest persons to return their own privileges. As for the *mandamus* desired, two things are to be considered: First, Whether it lies? Secondly, Whether it ought to be granted, in case it be doubtful whether it lies, or not? As to what has been said concerning the jurisdiction of this Court, that is out of dispute. But though a court has jurisdiction, yet it ought not to be exerted but where it is necessary; and if the court of aldermen are to choose one of the four elected by the wardmote, and not returned by the lord mayor, then sure I am that this *mandamus* cannot be necessary; for then it will be just the same thing, whether the persons chosen come before the court of aldermen, by way of complaint, or by the return of the lord mayor, in obedience to this *mandamus*. As this *mandamus* is unnecessary, so will it be ineffectual; for the end of it is only to bring the persons chosen before the court of aldermen, which may be done as well by complaint of the persons injured. And after this *mandamus* granted, the aldermen must do just the same thing they are bound to do now upon complaint, *viz.* consider which are the persons chosen by the wardmote. The darkness complained of in the scrutiny, only prevents that examination, which upon a complaint may be had. One difference there is between proceeding by complaint and *mandamus*, that the former is more compendious and less expensive. Now, as to the persons that may be affected by this way of proceeding: to begin with the court of aldermen; they will be under a necessity of returning their own privileges to a *mandamus*, consequent of this now asked; or, no means being left them to know which were truly chosen, of obeying the writ blindly, without knowing whether they do wrong or right. * As for *Sir Gilbert*, if he obey the writ, he is subject to an action for a false return to the court of aldermen; and no instance yet has been produced, where obedience to a mandatory writ of this court exposes a man to an action. If he return "*non* "*electi*," he is liable to an action upon both returns. Actions have indeed been brought against an archdeacon for refusing, but never, as my BROTHER EYRE has observed, for paying obedience to a mandatory writ of this court. It has been objected, there are some cases, wherein persons by merely executing the process of the law may become subject to actions; but surely, such a consequence is a very good reason for not giving way to an unprecedented process, unless otherwise there would be a failure of justice. It has been objected, that it is highly unreasonable for the same persons

* [60]

* [61]

to

THE QUEEN *against* SIR GILBERT HEATHCOTE, LORD-MAYOR OF LONDON.

to be judges of the goodness of the return, and to choose one of them too: I answer it is unreasonable, that they should be at liberty to take which four they please, but not at all, that they may consider which of the parties were really elected. It does by no means follow, that because they are the final electors, that therefore they are the proper judges to do right, and judge which four were duly elected; and if they do wrong, then is the proper time for this Court to interpose by granting *a mandamus*. Indeed it has been said, that *a mandamus* will not lie, in the first place, to the court of aldermen; that the aldermen have no authority but upon the return of the lord mayor, and consequently that *a mandamus* to the court of aldermen can be of no use, unless it be subsequent to the *mandamus* to *Sir Gilbert Heathcote*: this objection supposes the court of aldermen concluded by the return of the lord mayor; and if this be so, then there is no way to let these persons into their right, but by setting aside the return already made; which cannot be done * by *mandamus*, but by *action of deceipt* only. Even in the case of a sheriff, where the return is into our own court, there is no way of doing it but by an action of deceipt; much less can it be done in the case of a return to a foreign court. If this be so, the *mandamus* will signify nothing; for the court of aldermen will be concluded by the first return. I was once considering, whether a second return, made in obedience to a *mandamus* of this court, might not vacate the former; but then, I saw, this inconvenience would still attend the court of aldermen being bound by the return, though this should be so, *viz.* that if a return should be made in the long Vacation, then such a return, though a false one, and evidently so, must yet conclude the court of aldermen; it being then impossible to apply for a *mandamus*. But another absurdity ensues from this opinion, *viz.* two conclusive returns: I say two; for if the last is not a conclusive return and the former is, this *mandamus* is vain; and if the first be not conclusive, why should the last? But this opinion is confuted by the bye-law of *Henry the Fourth*, which directs them to choose one of the four chosen not returned. Likewise all the instances produced, of the power of the court of aldermen over returns, confute this fancy. In short, the way by complaint is a compendious one; that by *mandamus*, long and intricate: for upon these two *mandamus's*, viz. that desired, and the subsequent one to the court of aldermen, there may be contrary verdicts; which will leave it at last doubtful, whether right is done or not.

* [62]

As to the second point, Whether the Court may not grant this *mandamus*, though doubtful whether it lies or not, there is no doubt but this Court have granted *mandamus's*, when doubtful; but as they may grant, so, most certainly, they may refuse; which I think we ought to do in the present case, where the granting of it will * probably long continue that confusion in the City, that a little good advice may soon put an end to (*a*).

* [63]

(*a*) The contests which prevailed in the City at this period at length produced the statute 11. *Geo.* 1. c. 18. by which the mode of these elections is now regulated.

The

The Queen *against* Williams. Case 33.

HUSBAND and WIFE were indicted for keeping a bawdy-house.

A husband and wife may be indicted jointly for keeping a bawdy-house.

S. C. Salk. 384.

IT WAS MOVED *in arrest of judgment*, that husband and wife could not be jointly indicted for keeping a bawdy-house, and *Brook's Case (a)* was cited.

BUT *it was answered*, that the indictment was not only for keeping a bawdy-house, but for procuring lewdness, &c.; that these crimes are in their nature several; that husband and wife may be found guilty of nusance, battery, or the like; that the reason why in burglary, larceny, &c. the wife is excused is, because she cannot tell what property the husband may claim in goods, &c.; and that in *Hilary Term*, in the second year of *Queen Anne*, *James Cook* and his wife were jointly indicted for keeping a bawdy-house, and the husband fined, and the wife set in the pillory.

THE COURT. The indictment is good. Keeping the house does not necessarily import property, but may signify that share of government which the wife has in a family as well as the husband.

(a) 2. Roll. 8.

*[64]

D'aeth *against* Baux. Case 34.

THE COURT was moved for *a prohibition* to the spiritual court, for suffering a *feme covert* to sue singly upon the statute of Distributions; because it was for a property so vested in the husband that it might be released by him.

A wife may sue in the spiritual court for her share of an intestate relation's estate, under the statute 22. & 23. *Car.* 2. c. 10. without her husband.

* THE COURT said, that no prohibition lay, for this was a *chose in action*, and so much the wife's that she shall have it by survivorship; and if the husband had been joined in the suit, it would have been only for conformity. This case differs not from the case of a legacy; for which it is the course of the spiritual court to admit *feme coverts* to sue alone; but, supposing it was not the practice of the spiritual court to suffer a *feme covert* to sue without her husband, the party's remedy is by appeal, not prohibition.

2. Roll. Abr. 298.
1. Bl. Comm. 444.
2. Vern. 614.
3. Peer Wms. 39.

However a short day being given to shew cause,

DR. PINFOLD, upon the last day of the Term, *argued against the prohibition*; because it was a case where the spiritual court had confessedly a jurisdiction, and therefore they ought to proceed according to their own rules: that according to these rules, a woman, though a *feme covert*, was admitted to sue *sole* in every one of the following cases, *viz.* first, when executrix; secondly, when administratrix; thirdly, when legatee; fourthly, when legatary; fifthly, when defaming; sixthly, when defamed; that if this were not so, the party should have appealed, not moved for a prohibition.

In

D'Aeth against Bapt.

IN ARGUING *for the prohibition*, the most material thing replied to was, that though the ecclesiastical courts had jurisdiction in this matter, yet deriving this jurisdiction from the temporal law, *viz.* the statute of Distributions, they ought to conform their proceedings to the rules of common law.

THE COURT said,* that so they ought in matters of substance, but not in matter of form, as this most certainly is.

*[65]

Case 35. The Queen *against* Whitehorn, Mayor of Portsmouth.

In *quo warranto* against a mayor, if the defendant plead an election "*according to the* "*form of the* "*charter*," and issue be joined on a replication "*not elected in* "*manner and* "*form, &c.*" QUÆRE, Whether it be necessary for the defendant to shew that he has received *the sacrament*, as prescribed by the Corporation Act 13. *Car.* 2. st. 2. c. 1.

THIS was an information in nature of a *quo warranto* against *Whitehorn*, for exercising the office of mayor in the town of *Portsmouth*; and against others for exercising the office of aldermen.

* *Whitehorn* pleaded the charter of *King Charles the First* incorporating the town of *Portsmouth*, &c. and set forth a particular clause in the charter, whereby it is declared, "that if the mayor "shall die, or for just reasons be removed, it shall be lawful for "the aldermen to choose another mayor for the remaining part of "the year, until the time to elect come about again;" then he sets forth that the mayor died, and that he was chosen by the majority of the aldermen *secundum formam chartæ prædict.*

THE ATTORNEY GENERAL replied *non electus modo et formâ*, &c.

The aldermen pleaded their being chosen under the mayoralty of *Whitehorn*.

Issue was joined upon *non electi modo et formâ*, *secundum formam chartæ*.

IT WAS INSISTED, upon the trial at the assizes, that the defendants, to prove the issue, must first prove themselves qualified, by receiving the sacrament according to the statute of *King Charles the Second* (*a*); which point, instead of being found specially, was saved by the Judge who tried the cause.

SUBSTANCE OF AN ARGUMENT *for the defendants*. IT WAS SAID, that this act of parliament could not be understood to make elections void, but voidable; that the act was made for regulating, not disturbing corporations, as it would do, if it made all elections of persons not qualified, according to it, nullities; that there were other statutes with words altogether as strong as those used by this act, which have yet received such an interpretation; that the statute 5. *Edw.* 6. c. 4. says, "that the offender shall be *ipso facto* ex- "communicated;" yet a precedent conviction has been held ne-
[66] cessary. * It was said, that acts done by officers *de facto*, though

(*a*) The Corporation Act, 13. *Car.* 2. st. 2. c. 1.

not *de jure*, in execution of their office, are good (*a*). If therefore *Whitehorn* was a *de facto* mayor, that was enough to support the election of the aldermen. Supposing upon a general issue, of "*electi vel non electi*," it would have been incumbent upon the defendants to prove themselves qualified, by taking the sacrament; yet upon this special issue of "*electi vel non electi secundum formam chartæ*," this could not be necessary, the charter being altogether silent as to these qualifications. When issue is joined upon a plea, no advantage shall be taken of any matter collateral (*b*). In *Hobart*, 72. upon an issue "*feoffavit vel non*," the jury found a feoffment, but a covinous one; and the Court was there of opinion, that upon this issue a covinous feoffment was a feoffment; and that if the party would have taken advantage of the covin, he ought to have done it by special pleading. It is there likewise said, that a *non est factum* cannot be pleaded upon the statute of Usury, or sheriff's bonds; nor can a letter of attorney by an infant be avoided without special pleading. The reason of all these cases seems to be this, that these things have the appearances of feoffments, bonds, &c. though they want the validity. As it would have been no evidence, upon this issue, to have shewn a title by a subsequent charter, it is not reasonable the other side should take advantage of a subsequent act of parliament (*c*).

THE QUEEN against WHITEHORN, MAYOR OF PORTSMOUTH.

(*a*) Cro. Eliz. 669. Harris *v.* Jay, Cro. Jac. 552.

(*b*) 2. And. 82.

(*c*) By 13. *Car.* 2. st. 2. c. 1. "no "person shall be placed, elected, or chosen "mayor, &c. who shall not have, within "one year next before such election or "choice, taken the sacrament, and in "default thereof every such placing, "election, and choice, is declared to be "void."—But by 5. *Geo.* 1. c. 6. "no "person shall be removed by the corporation, or otherwise prosecuted, for or "by reason of such omission; and no "incapacity, disability, forfeiture, or "penalty shall be incurred by reason of "the same, unless such person be so removed, or such prosecution be commenced within six months after such "persons being placed or elected into his "respective office, &c." And see Harrison *v.* Evans, Kyd on Corp. 351. Rex *v.* Monday, Cowper, 535. Rex *v.* Smith, 3. Term Rep. 573.

* [67]

Earle *against* Peale.

Case 36.

THIS was an action brought upon *a note*, for money lent to *an infant* for his support and maintenance. * A verdict and judgment were given for the plaintiff; and a writ of error brought in the court of king's bench.

A promissory note given by an infant is void, although it is expressed that the money lent was for his support and maintenance.

It was argued that this action did not lie.—In *Co. Lit.* 172. it is indeed said, that an infant may bind himself to pay for his necessary meat and drink; but this was never carried farther. In the case of *Whittingham v. Hill (a)*, it is held, that the contract of an infant for wares for the necessary carrying on his trade, whereby he subsists, shall not bind him.

S. C. 1. Salk. 386.
Cro. Jac. 602.
Latch. 169.
*Palm. 528. Moor, 679.

(*a*) Cro. Jac. 494. 560.

It

EARLE *against* PEALE.

IT WAS AGREED *by the other side*, that in case the money thus lent upon this note was not actually laid out by the infant for necessaries, the plaintiff could not recover upon it; but, it was said, the plaintiff could never have obtained this verdict, without first proving that the money was actually so laid out.

THE COURT. There is a great difference between lending an infant money to buy necessaries, and actually seeing the money so laid out. In this case the lending for such a purpose is only put in issue, which might be maintained without shewing how the money was actually laid out; that if the fact was so, the plaintiff should have declared as for money so laid out, and not so lent. The law knows of no contracts but what are good or bad at the time of the contract made; and not to be one or other, according to a subsequent contingency.

Accordingly, the next Term, the judgment was reversed, *nisi* (*a*).

(*a*) See Williams *v.* Harrison, Carth. 160. Trueman *v.* Hurst, 1. Term Rep. 41.

Case 37. Dummer *against* ———.

An *elegit* stating the judgment to have been given on the day the writ was *signed*, cannot be amended.

THE COURT was moved to amend *an elegit*. The *elegit* set forth, that judgment was given upon the ninth day of *January*, when in fact it was given upon the twenty-third day of *October*, and signed the ninth of *January*.

*[68]

* In behalf of the motion were cited the cases of *Wheadon v. Sugg* (*a*), and *Lewson v. Redleston* (*b*), where writs of inquiry, which are judicial writs, are held amendable; and *Vavasor's Case* (*c*), and the case of *Hersy v. Whitlock* (*d*), about the same time in the common pleas, and *Brook* (*e*), where an *elegit* was held amendable.

THE COURT was of opinion that the writ was not amendable, because it might occasion an alteration in a verdict upon a *writ of inquiry*; for between the twenty-third of *October* and the ninth of *January*, he might have lands that he had not the ninth of *January*.

Adjournatur.

(*a*) Cro. Jac. 372.
(*b*) Cro. Eliz. 877.
(*c*) Hilary Term, 6. *Anne*.
(*d*)
(*e*) Bro. Abr. "Elegit" 44. *Edw.* 3

Case 38. The Queen *against* Wooton.

Justices of peace have only jurisdiction over servants employed in husbandry. Salk. 441, 442.

JUSTICES OF PEACE have no jurisdiction by the statute 5. *Eliz.* c. 4. s. 15. to judge of wages except in case of *husbandmen*: But yet the Court, in favour of *servants*, will always, unless the contrary appear upon the face of the order, presume servants to be

servants

ſervants in huſbandry (*a*), and will admit of no collateral proof to the contrary (*b*). The Queen *againſt* Wooton.

(*a*) See Rex *v.* Gregory, 2. Salk. 484. Rex *v.* Helling, [illegible]. Rex *v.* Clegg, Stra. 475, and Reg. *v.* Cecil, Ld. Ray. 1305.

(*b*) By 1. *Jac.* 1. c. 5. it is enacted, "that the 5. *Eliz.* c. 4. ſhall extend to "the rating of wages of all labourers, "weavers, ſpinſters, and workmen or "workwomen *whatſoever*, either working by the day, week, month, year, "or taking any work by the great or "otherwiſe;" and by 20. *Geo.* 2. c. 19. 31. *Geo.* 2. c. 11. and 6. *Geo.* 3. c. 25. "juſtices have juriſdiction between maſ-"ters or miſtreſſes and ſervants in huſ-"bandry, hired for a year or for leſs "time; or between maſters and miſ-"treſſes and artificers, handicraftmen, "miners, colliers, keelmen, pitmen, "glaſſmen, potters, and other *labourers*, "employed for any certain or in any other "manner." But it ſeems that theſe ſtatutes do not extend to *ſervants in general*, Cald. Caſes, 57. and the caſes there cited.

Dr. Harriſon *againſt* The Archbiſhop of Dublin. Caſe 39.

A biſhop, notwithſtanding appropriation, may viſit and ſuſpend, but not deprive.

S. C. 1 Brown P. C. 418.
S. C. 3. Viner Ab. 40.
S. C. 17. Viner Ab. 244.

THIS was A WRIT OF ERROR out of *Ireland*, and the queſtion was, Whether or no the appropriation of a rectory to a priory, or a dean and chapter, exempted this rectory from the viſitation of the biſhop, in whoſe dioceſe it lay; and if it did not, Whether he might not upon viſitation proceed to the ſuſpenſion of the incumbent *ab officio et beneficio*? Deprive him, it was clear he could not.

THE COURT ſeemed of opinion, that the biſhop, notwithſtanding the appropriation of the benefice, might * viſit to ſee how the church was ſerved, the ſacraments adminiſtered, &c. and might proceed to ſuſpenſion. *[69]

Adjournatur (*a*).

(*a*) See the whole proceedings in this caſe, 1. Brown's P. C. 418 to 4[illegible].

Stafford *againſt* Beneath. Caſe 40.

In actions upon ſpecialties or contracts, where the ſum is certain, the plaintiff cannot abridge his own demand without ſhewing how the reſt is ſatisfied; but in actions that lie in damages it is otherwiſe.

AN ACTION OF DEBT for fifteen pounds: the plaintiff declares upon two demiſes, and that upon the one demiſe there was ten pounds rent behind, and upon the other twelve pounds. To this the defendant demurs. Afterwards the plaintiff enters a *remittitur*, for all that appears due from the declaration, over and above the fifteen pounds demanded in the writ.

IT WAS ARGUED *for the defendant*, that ſuppoſing the declaration naught, the *remittitur* would not help it. In the caſe of *Duppa v. Mayo* (*a*) it is expreſsly reſolved, that a *remittitur* in ſuch a caſe would ſignify nothing at all; and the reaſon given for it is, becauſe a man that had a good cauſe of demurrer, at the time of his demurring, might by this means be tricked out of it. To prove the declaration bad, this ground was laid down, that in an

(*a*) 1. Saund. 285

STAFFORD *against* BENEATH.

action of debt for rent, the plaintiff cannot abridge his own demand, without shewing how the rest was satisfied. In the case of *Pemberton v. Shelton* (a), this difference is taken, that where an action is grounded upon a specialty, or upon a contract where the sum is certain, or upon a statute which gives a certain sum for the penalty, no demand can be of a lesser sum, without shewing how the rest was satisfied: but where a person, if he recover, is to recover not a sum certain, but according to what a jury will give; not according to his demand in the declaration, but according to the verdict; there it is otherwise. In the case of *Thornton v. Kemp* (b), the abating of ten pounds, not shewing how, is adjudged naught. In the case of *Hulm v. Sanders* (c), in an action of debt for rent, the demand was * for a hundred pounds, and by the declaration it appeared that a hundred and eleven pounds was due; the Court were of opinion, though after a verdict, that the judgment ought to be reversed. In the case of *Bolton v. Lee* (d), HALE, *Chief Justice*, took the difference between covenant and debt before-mentioned in the case of *Pemberton v. Shelton*, and held, that even in covenant, upon special demurrer, such demand was naught.

* [70]

THE COURT was of opinion for the defendant; and thought the difference taken between actions brought for a sum certain, and actions that lay in damages, to be good law. They said, that upon this declaration, they could give judgment for no less than twenty-two pounds, which is more than was demanded in the writ. As for the *remittitur*, if that could have altered the judgment, the Court might have done it without.

EYRE, *Justice*, desired the Counsel, before they spoke to it again, to consider of two cases, that he took to be cases in point for the defendant, viz. the case of *Young v. Watson* (e), and the case of *Staughton v. Newcombe* (f).

Adjournatur.

(a) Cro. Jac. 499.
(b) 1. Cro. 447.
(c) 2. Lev. 4.
(d) 2. Lev. 57.
(e) Cro. Eliz. 308.
(f) Cro. Eliz. 434.

Case 41.

The Queen *against* Morgan.

Serving an apprenticeship partly *in* and partly *out* of England is sufficient.

1. Salk. 67.

RESOLVED *obiter* by THE COURT, upon the statute 5. *Eliz.* c. 4. f. 31.

FIRST, That serving five years to a trade out of *England*, and two in *England*, is enough, and satisfies the statute. But there must be a service of a full time either in *England* or out of *England*; therefore serving five years in a country where by the law of the country more is not required, will not qualify a man to use the trade in *England*.

SECONDLY,

SECONDLY, That a wife living with her husband seven years, may, after his death, continue the trade; for the statute 5. *Eliz.* c. 4. does not require a man or woman to be an actual apprentice, but the words are *tanquam* an apprentice. Serving as an apprentice is sufficient. 2 Salk. 613. Comyn. 163. 2. Hawk. P. C. 462.

* THIRDLY, That if a man live with another who uses a trade, which other is not qualified for using it, seven years, he may set up the trade as well as if he had lived with one never so well qualified. *[71] A person serving seven years with an unqualified master is sufficient.

Anonymous. Case 42.

ON A MOTION to quash a writ *de excommunicato capiendo*, A writ of excom. need not state the cause of defamation.

THE FIRST EXCEPTION was, that the writ says only "*causâ defamationis*," but does not say what defamation; now there are some defamations that are not of spiritual conuzance. 2. Atk. 408. 1. Salk 293. B R. H. 314. Stra. 43. 950.

This objection was over-ruled by the Court, who said, they would not presume that any court would exceed its own jurisdiction, unless it appeared plainly it had done so.

THE SECOND EXCEPTION was, that the standing forty days excommunicated, did not appear in the writ. A writ of excom. need not state the forty days excommunication.

Sed non allocatur, for the forty days are never inserted in *the writ*, but in the *significavit* only (*a*); besides, this objection is not proper here, but in chancery; the forty days excommunication being the very foundation upon which the Court grants the writ. F. N B. 64. 12. Co. 76.

THE THIRD EXCEPTION: There must be a proper addition; now the word was "*chicthecario*," instead of "*chirothecario*." Addition.

Sed non allocatur.

(*a*) See Cro. Car. 197. 199. 2. Jones, 89. 3 Mod. 89. 1. Salk. 294. 4. Com. Dig. "Excommengement" (B. 4.)

Thomlinson *against* Dighton. Case 43.

PARKER, *Chief Justice*, delivered the resolution of the Court to the following effect:—There are two questions in this case —The first is, Whether the wife by this devise took an estate in fee, or for life?—And secondly, Whether her power was well executed?

If a testator devise lands to his wife for life, and then to be at her disposal, provided it be to any of his children, the wife takes only an estate for life; and a conveyance, by lease and release and fine to a trustee to the use of herself for life, without impeachment of waste, with remainder to her daughter by the testator in tail, with remainder to her son by the testator in fee, is a good execution of the power.—S. C. ante, 31. S. C. 1. Salk. 239. S. C. 2. Eq. Abr. 309. S. C. 1. Peer Wms. 149.

THOMLINSON *against* DIGHTON.

* As to THE FIRST QUESTION, We are all of opinion, that she took but an estate for her life. Because the will expresly gives her an estate for life; and the power of disposal does not at all alter her estate, because it is a distinct clause. The cases relied upon by the Court for their opinion in this point, were an *Anonymous Case* in *Leonard* (*a*), upon which great stress was laid; the case of *Daniel v. Upley* (*b*); and the case of *Sir Richard Saltonstall* (*c*), devise to a wife for life, with a power to dispose of it to which of her children she pleased.

As to THE SECOND QUESTION, We are all of opinion, that the power is well executed. For as to the first objection, that the power was extinguished by the fine, it may be answered, that if the power was well executed, it was executed by the deed, which was antecedent to the fine; and therefore it is impossible for the power to be extinguished by the fine.

As to the second objection, that the power ought to have been executed by *will*, and not by *deed*; which is built upon the word "then," importing, as they say, that very instant of time when her estate determines; then, and not till then, her power enables her to dispose, and which must necessarily be done by will. To this objection we answer, FIRST, That the words of the power do not expresly mention any particular way of conveyance, by which this power should be executed, but leave it indifferent. *Hobart* says (*d*), "that all forms and circumstances of powers are to be observed;" but then it is added, that "this is to be understood of such forms "and circumstances as are expressed, not imagined:" now here no particular sort of conveyance is expressed. That case last mentioned in *Hobart*, was indeed the reverse of this; for there the

* [73]

question was concerning the power of revocation, but here * of the execution. However it fits the present case; for there the question was, Whether a revocation could be executed by will? for from the words of the proviso, "then and thenceforth," it was argued, that no revocation could be good, that was done by will; for a will, as was said, is revocable, and is of no force at all until the death of the testator; whereas, it was urged, that THE PROVISO says, "then, and from thenceforth," *viz.* from the time of sealing, &c. the uses shall be executed, which a will cannot do. But the Court held the power of revocation might be executed by will, and that the words "then and thenceforth" should be rejected as surplusage.—SECONDLY, The word "then" refers to the remaining of the lands, and not to the time of the disposing them, *viz.* that then her disposal, when so made, shall take effect.—THIRDLY, "Then" is equivalent to "after her death," which shews it cannot be done by will.

(*a*) 3. Leon. 71. See also Higham v. Baker, Cro. Eliz. 15.

(*b*) 1. Jones, 137. Latch, 9. 39. 134. Noy, 80.

(*c*) 2. Lev. 104.

(*d*) Hob. 312.

As to THE THIRD OBJECTION, that it was executed by a conveyance to the parties, and not trustees, we answer, That these powers are executed by all sorts of conveyances. 1. *Rolls*, 329. *Dike v. Rich* 1. *Ventris*, 228. *King v. Melling*. THOMLINSON *against* DIGHTON.

As to THE FOURTH OBJECTION, that this conveyance left in her an estate for life, without impeachment of waste, which was not in her power to do; we answer, The children will be in, not by virtue of her conveyance, but by the will, and so will over-reach her estate without impeachment of waste; and consequently that clause in the conveyance, "without impeachment of waste," will have no operation; for the children may notwithstanding bring an action of waste against her.

HILARY TERM,

The Tenth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*

Sir Lyttleton Powys, *Knt.* }
Sir Robert Eyre, *Knt.* } *Justices.*
Sir Thomas Powys, *Knt.* }

Sir Edward Northey, *Knt. Attorney General.*

Sir Robert Raymond, *Knt. Solicitor General.*

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* The Queen *against* Sutton.

Case 44.

THIS was an information in nature of a *quo warranto* against *Sutton*, for usurping the office of a common burgess of the town of the *Devizes*, in *Wiltshire*.

The office of *deputy-recorder* is grantable by parol, and therefore the *copy* of a written appointment is not evidence, unless it be shewn that an *original* existed and is lost.

Upon the trial at bar upon this issue, whether *Sutton* was chosen a capital burgess, by the mayor, recorder, and capital burgesses, the following points arose:

THE FIRST QUESTION. The recorder had made a deputy-recorder, by writing under his hand and seal, and afterwards had revoked this deputation by another writing, a copy of which was offered in evidence of the revocation.

But this was held not good evidence, because it did not appear but they might have produced the original. The deputation of an office is in its own nature grantable by parol; and therefore though it should happen to be granted by writing, yet since it is in itself grantable by parol, it may be revoked by parol.

If a charter impower "the "mayor, re"corder, and "burgesses, *vel* "*major pars co*"*rundem* to "act;" acts done by the mayor and burgesses without the recorder are good.

THE SECOND QUESTION. By the charter that incorporates this town, the mayor, recorder, and, in his absence, deputy-recorder, and capital burgesses, *vel major pars eorundem*, are impowered * to choose capital burgesses.

The question was, Whether, upon these words of the charter, " acts done by the mayor and majority of the burgesses, without " the presence of the recorder, or his deputy," were good?

1. Stra. 53.
3. Wilf. 398.
1. Ld. Ray. 1236.
2. Salk. 434.
Kyd on Corp. 308. 427.

THE COURT seemed to incline that they were good, because the word "*eorundem*" refers not only to "capital burgesses," but to " mayor, recorder, and capital burgesses;" and yet the reason why the presence of the mayor is necessary to corporate acts, is not because he is particularly named, but because he is the head of the corporation; and if this were not so, the addition of these words in charters, *quorum* recorder *unus*, would be useless and unnecessary (*a*).

What evidence shall be necessary of the authority of a corporation to do corporate acts.

THE THIRD QUESTION was, Whether, supposing it not necessary by the charter that the recorder should be present, yet the issue did not oblige them to prove him present at the election?

To this it was said by the Counsel, that *concesso* the charter did not require the presence of the recorder, the question was no more than this, Whether they should be obliged to prove an immaterial part of the issue? It was said farther, that by a parity of reason it might be expected, that they should prove the presence of every one of the common burgesses; that by the issue no more was meant than that the election was made by those that had a power to do it; that *ubi major pars, ibi tota*, viz. the authority of the whole.

And of this opinion was THE COURT.

Quære, Whether a person may be both mayor and deputy-recorder.

THE FOURTH QUESTION started was, Whether, in a corporation that was by charter to consist of mayor, recorder, common burgesses, &c. the same person might not be both mayor and deputy-recorder (*b*)?

* [76]

If a charter appoint a burgess to be sworn in before "the "mayor, re"corder, and "burgesses, or "the majority "of them then "there present;" *quære*, Whether there must be a majority of the whole body present?—See Kyd on Corp. 424.

THE FIFTH QUESTION was upon the words of the charter, which appoints the swearing of a common burgess to be done before the mayor, recorder, common burgesses, or the majority of them, *tunc ibi præsentium*; * Whether or no a majority of the whole body was by these words necessary to be present at the swearing; or, Whether a majority of those that were present, was only requisite, though they should not be the majority of the whole?

(*a*) See 2. Bar. K. B. 74. Rex *v.* Newsham, Sayer, 211. Rex *v.* Monday, Cowp. 537. Rex *v.* Grimes, 5. Burr. 2598. Rex *v.* Varlo, Cowp. 248. Rex *v.* Bellringer, 4. Term Rep. 810.

(*b*) See Rex *v.* Trelawney, 3. Burr. 1615. Rex *v.* Jordan, B. R. H. 255. Rex *v.* Goodwin, Dougl. 383. *notis.* Rex *v.* Pateman, 3. Term Rep. 777. Milward *v.* Thatcher, 2. Term Rep. 80.; and see Kyd on Corporations, 369.

It

It was said, that upon the reason of the thing it was not necessary that the swearing in should be done with the same solemnity as the choosing in; for the choice is a voluntary deliberate act; the swearing in, on the contrary, is what a person once chosen may challenge as his right, and may by *mandamus* compel them to do. And if this construction did not prevail, the words in this clause of the charter, concerning the swearing, *tunc ibi præsentium*, which are not in the clause concerning the election, would signify nothing.

THE QUEEN *against* SUTTON.

As for the objection, that it seems absurd to say a man must be sworn before a majority of those that are present, since if they are present he must unavoidably be sworn before them all, the answer is, that this clause is to be understood of being sworn in by the consent of a majority of those that were present.

THE SIXTH QUESTION was, Whether, by a charter that requires acts to be done by *a majority* of the corporation, a person might not be removed by a majority of that body, excluding the persons that are to be removed, and cannot vote in their own cause?

If a charter impower a majority to remove, it means a majority of the whole corporation.

But THE WHOLE COURT were of opinion, that a removal being an act of an odious nature, all clauses concerning it must receive a strict interpretation; and that therefore the word "majority" should be understood of a majority of the whole corporation?

Kyd on Corp. 308. 311. 400.

*[77]

A SEVENTH QUESTION raised was, *Whether not summoning to a meeting members *de facto* disfranchised, though afterwards upon re-examination it should appear they were still lawful members, should vacate acts done * in those meetings?

A summons to a meeting of members *de facto* is good.

THE COURT inclined to think it would not vacate them.

Some of these points were directed to be found specially.

Kyd on Corp. 312. 430. 451. B. R. H. 151. 1. Stra. 584.

Assievedo *against* Cambridge.

Case 45.

UPON A SPECIAL VERDICT the case in substance appeared to be this:

Assievedo had insured so much money upon a ship called THE [illegible] for such a voyage, in which ship *Assievedo* is found by the verdict *not to be at all concerned, in point of interest*. It happened that this ship was taken by the enemy, and kept in their possession for nine days, and then, before it was carried *infra præ-*

If a ship insured be taken by the enemy, and after a possession of nine days, but before she is carried *infra præsidia*, be retaken by an English man of war, the property is not changed; but if it be found that the plaintiff in the policy is not *concerned in point of interest*, he cannot recover against the underwriters.

sidia,

ASSIEVEDO against CAMBRIDGE.

fidia, viz. a place of safety, it was retaken by an *English* man of war (*a*).

The question was, Whether or no this was such a taking as should enable the plaintiff to recover the sum insured against *Cambridge*?

DR. FLOYER *for the plaintiff* argued, that this was rather to be esteemed *a wager* than *an insurance*; a *spei emptio et venditio*, and not a *versio periculi*, which in the books of the civil law is looked upon as a proper definition of an insurance; that therefore whatever acts of parliament are made about insurances must be understood of proper insurances, and not insurances of the goods of strangers; that whether or no this is such a taking as will divest the property out of the owners, is a question properly between them and the retakers; but that the question between *Assievedo* and

* [78] *Cambridge* is only, Whether the ship be taken? * This case was compared to a man laying a wager that he should not be robbed in going to such a place; he is robbed, but taking some along with him pursues the robber, and recovers what he lost: here, though the money is recovered, yet the wager is lost. So if the wager had been, that such persons should not be married together; they are married, and afterwards divorced, *præcontractûs causâ*, yet the wager is lost. It was said further, that without this exposition *Cambridge* would have two chances, *viz.* that it is not taken, or that it is retaken; but *Assievedo* would have but one, *viz.* the taking. *Grotius* (*b*) lays this down as a rule, *placuit gentibus, ut is cepisse rem intelligatur, qui ita detinet, ut recuperandi spem probabilem alter amiserit.* Now in our case the ship was for nine days together in the possession of the enemy. By the laws of *Spain* and *France*, a continuance in the possession of the enemy for twenty-four hours is an alteration of the property; and *Albericus Gentilis* tells us, that a pernoctation with the enemy would, by our old *English* law, alter the property. And *Grotius*, immediately after the place before-mentioned, says, that "*recentiori jure gentium* "*inter* EUROPÆOS *populos introductum videmus, ut talia capta* "*censeantur ubi per horas viginti quatuor in potestate hostium* "*fuerint.*"

DR. HENCHMAN *for the defendant* argued, that surely the law would not put an insurer *non bona fide*, or a wagerer, in a better condition than one that insured *bona fide*, and say that any taking shall enable a wagerer to recover; but that no taking but such as

(*a*) It appears upon the special verdict in this case, that "the man of war which "retook the ship brought her into the "port of *London*, and restored her to the "owner upon reasonable redemption;" and therefore it is said, that the question in this case could not have arisen upon the *change of property*, because the owner not abandoning the ship could only have come upon the insurers for the redemption; but that THE POLICY being "*interest or* "*no interest without benefit of salvage*," the question was upon the terms and meaning of the wager: *per* LORD MANSFIELD, in the case of Goss *v.* Withers, 2. Burr. 695.

(*b*) Grotius de Jure Belli et Pacis, lib. 3. cap. 6. sect. 3.

alters

alters the property shall enable a real *bona fide* insurer to recover. * This question in the court of admiralty would not have borne a dispute; for the law is clear, that not length of time, but the bringing *infra præsidia*, into a place of safety, is that which devests the property. And for that the case of *The East-India Company v. Sands*, in the late war, was cited; where the ship was taken by *Dubart*, in the year 1691, off of *Yarmouth*, carried to *Northbergen*, then sold to *A.* afterwards sold to *B.* *B.* sends her to the *West-Indies*, afterwards to *France*, and in the year 1695 to *England*, where, she being retaken, it was resolved, that the property was not altered. The words of the judgment in this and the like cases are very remarkable: "*in præsenti pertinere*" is part of the sentence: for the sentence does not give a new right, but confirms an old one. In the civil law, alteration of property is a thing of an odious nature; and therefore the law, even by a fiction, prevents it, as in the *jus postliminium*; where, in order to preserve property in the person returning *jure postliminii*, the law esteems him never to have been a captive, that so *manente cive maneant sua bona.*—LUD. MOLIN. *de Justitia, in Disputatione* 118. "*Priori-* "*bus dominis restituenda quæ capta fuerint ab militibus, quibus* "*numerantur stipendia. Bello res per vim usurpantur, quando ad* "*locum tutum, &c.*" PETRINUS BELLUS, *Part* 3. *No.* 11, *de Postliminii Jure reversis*: "*Insuper sciendum, hostibus capta non* "*statim hostium fieri. Milites dicunt*, that things so long in the "possession of the enemy *eorum fieri: jura hoc non dicunt, cum* "*fieri potest* that the property may be altered by the possession of "a shorter time, *et forsan* not altered *diuturniori possessione.*" CONSULAT. DEL MARE, *cap.* 287. a book of great authority, lays down the security of the place into which *deducuntur capta*, as that which causes the alteration of property; otherwise, after a proper reward to the retakers, *prioribus, &c.* * ALBERICUS GENTILIS, in the place quoted by the advocate for the plaintiff, has for his title these words: "*Rem non fieri hostis ante deduc-* "*tionem infra præsidia*:" and his determination is pursuant to his title, and expressly against what THE DOCTOR quoted. GROTIUS, *lib.* 3. *cap.* 9. *sect.* 16. "*Eæ vero res, quæ infra præsidia perductæ* "*non sunt, quanquam ab hostibus occupatæ, ideo postliminii* "*non egent, quia dominum nondum mutarunt ex gentium jure.*" As for the quotation out of GROTIUS, "*receptioni jure, &c.*" GROTIUS builds there upon a mistaken foundation; for he quotes *Albericus Gentilis, lib.* 3.; and there is no third book. Indeed, in *cap.* 3. *lib.* 1. there is something like it; but *Grotius* quoted there part of an argument, without considering the conclusion, which is directly against his quotation; "*perductionem omnino desiderant* "*omnia*," says the book.

ASSIEVEDO *against* CAMBRIDGE.

* [80]

THE COURT seemed to be of opinion for the defendant. They thought, that the plaintiff's being found by the verdict to have *no interest* in the ship which he insured should make no difference. First, Because they never would be more favourable to an insurer *non bona fide*, or wagerer, than to one that insured *bona fide*.

Secondly,

ASSIEVEDO *against* CAMBRIDGE.

Secondly, Becaufe to make a different interpretation of this deed from what is commonly put upon policies of infurance, would be to run counter to the defigns of the parties, who have made ufe of the very fame words that are ufed in fuch policies; nay, who have exprefsly provided for this very cafe, by thefe words, "*intereft or* "*no intereft*;" which words fignify nothing at all, unlefs the fame lofs intitles to a recovery where the infurer has no intereft, and where he has. AND THAT the property is not altered by the taking, they held to be very plain.

To be argued next Term by common lawyers (*a*).

(*a*) It does not appear from any report, that a fecond argument was ever heard in this cafe, Park Inf. 73.—But fee now the ftatute 13. Geo. 2. c. 4. Park on Infurances, ch. 4. and the ftatute 19. Geo. 2. c. 37. Park on Inf. 14. and Woodefon's Lectures, vol. ii. Lect. 34.

*[81]

Cafe 46.

* The Queen *againft* Doughton.

A pauper cannot be removed to an extra-parochial place.

THE CASE was this: A man fettled in *a parifh* removed into an *extra-parochial place*, where he gained a fettlement, then removed into another parifh, and there became chargeable.

The queftion was, What this laft parifh can do with him? Whether, by virtue of that act of parliament that enables them to fend fuch a one to the laft parifh where he was legally fettled, they may fend him to the parifh he lived in before fuch time as he removed to the extraparochial place? for fend him to the extraparochial place they cannot, for want of officers to receive him.

POWELL, *Juftice*, took this to be *cafus omiffus*, and what ought to be moved in parliament; thefe extraparochial places being many in number, and of great extent (*a*).

(*a*) A pauper cannot be removed to an extra-parochial place, Rex *v.* Tamworth, Cald. 28. Bridewell *v.* Clerkenwell, Salk. 486.; nor to a place which does not feparately maintain its own poor, Rex *v.* Swacliffe, 2. Conft's P. L. 760.; but if the place *will*, overfeers may be appointed, 1. Conft's P. L. 23.; and then the pauper may be removed, 1. Conft's P. L. 28.

Cafe 47.

Whitlock *againft* Squire.

Tout temps pres muft be from the time the *caufe of action* arofe, and not from the time of *tender*.

Salk. 623.
3. Salk. 343.

THIS was an *indebitatus affumpfit* for goods fold and delivered.

The defendant pleaded in bar, that before the time of bringing the action he made *a tender* of the money, and that ever fince the tender *paratus fuit* to pay the money.

It was infifted upon, that the plea in bar was not complete enough; for he ought to have pleaded, that he has been ready to pay the money, not only ever fince his tender, but from the time the goods were delivered, *viz.* from the time the money firft became due.

And

And THE COURT seemed to think this a material omission; for it may be the money was demanded before the tender, and then there is a good cause of action. WHITLOCK *against* SQUIRE.

* Silk *against* Hill. Case 48.

THE QUESTION was, Whether, in *a writ of enquiry*, it was not necessary that there should be fifteen days between the *teste* and the return, as well as in other writs?

Whether in a writ of enquiry, as in other writs, there should be fifteen days between *the teste* and *the return*.

THE COURT seemed not to think it necessary, even by common law; but if it were necessary by common law, that it was helped by the equity and intention of 13. *Car.* 2. c. 2. s. 6. They did not think it necessary by the common law; because the statute of *Articuli super Chartas*, 28. *Edw.* 1. c. 15. made in affirmance of the common law, requires fifteen days between the *teste* and the return of all *summons* and *attachments* (*a*), as a reasonable time, in which the party, in whatsoever part of *England* he is, may be brought to court; but now *a writ of enquiry* is no summons, nor in nature of a summons; for both defendant and jurors are out of court. But supposing that by the common law fifteen days are required, yet they thought it might be within the equity and intention of the statute of 13. *Car.* 2. c. 2. the words whereof are, "that in all actions of debt and all other personal actions, and "actions of ejectment, after an issue joined therein to be tried by "a jury, and after any judgment had in any such action, there "shall not need to be fifteen days between the *teste* and the return "of the writs of *venire facias*, *habeas corpora juratorum*, *distringas* "*juratores*, *fieri facias*, *capias ad satisfaciendum*; and that the "want of fifteen days between, &c. in any such writ, shall not be "a cause of error." * Now the words "any judgment" suppose more than one sort of judgment; but after a verdict, there are but two sorts, *viz.* final and interlocutory judgments. Now after an interlocutory judgment, there never goes any writ but a writ of inquiry; therefore should not this statute extend to a writ of enquiry, the word "any" would be improperly used. And then the conclusion of the statute, "nor shall the want, &c. in any such "writ, &c." are words so general, that they need not be tied up to the writs before mentioned in the statute, but may very well be understood of writs of the same nature, and following such judgments: if indeed the conclusion had been, "in any of the writs "before recited," the statute could not have borne such an interpretation.

But the court of common pleas differing in their practice, in this particular, from the court of king's bench, according to the reports of THE CLERKS, it was judged proper for the Judges of both courts to meet and establish one uniform rule of practice.

(*a*) Co. Lit. 134. 2. Inst. 567.

EASTER TERM,

The Eleventh of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir Thomas Powys, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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* Anonymous. Case 49.

An order of removal not appealed against is conclusive.

IF A POOR PERSON be removed from the parish of *A.* to the parish of *B.* by an order of two justices, and the parish of *B.* remove him to the parish of *C.* the order of the justices removing him to the parish of *B.* is become final, because *B.* did not appeal to the quarter-sessions (*a*).

(*a*) See Rex *v.* Chipping Farringdon, Salk. 48. Malendine *v.* Hunsdon, Foley, 316. Rex *v.* Silchester, Burr. S. C. 551. Rex *v.* Llanhydd, Burr. S. C. 658. Rex *v.* Kirby Stephen, Burr. S. C. 664. Rex *v.* Hinxworth, Cald. 42. Rex *v.* Swacliffe, Cald. 248. Rex *v.* Southouram, 1. Term Rep. 353. Rex *v.* Kenilworth, 2. Term Rep. 598.

Anonymous. Case 50.

An order for the maintenance of a bastard-child is good, though it do not state that it was likely to be chargeable.

1. Const's P. L. 432.

AN EXCEPTION was taken to an order of justices made for the maintenance of a bastard-child, that it was not set forth in the order, that the bastard-child was likely to become chargeable to the parish, which is the very foundation of the jurisdiction of the justices of peace.

Sed non allocatur; for the law presumes that bastard-children will become chargeable, because nobody is bound to provide for them; and therefore this need not appear on the order.

ANOTHER

An order of maintenance to pay so much a week until the child shall be eight years old, is good.
1. Vent. 48.
Salk. 478.
2. Const's P. L. 433.

* ANOTHER OBJECTION was, that the order was for the reputed father to pay so much a week for the maintenance of the child, until the child should come to the age of eight years; whereas the order ought to have been conditional, if the child continue so long chargeable.

Sed non allocatur; for such orders in the very same form have often been allowed; and the words of the order, "towards maintenance of the child," imply such a condition.

Justices have original jurisdiction in bastardy.
Cro. Car 471.
Bulst. 255. 2. Bulst. 355. Salk. 122. 1. Stra. 475.

N. B. In case of bastards, complaint is not necessary to the giving justices of the peace jurisdiction, as it is in the case of poor (*a*).

(*a*) See Rex *v.* Greaves, Dougl. 532. and Mr. Const's edition of Bott's Poor Laws, 442 to 447.

Case 51.

Mitchell *against* Reynolds.

A bond conditioned for restraining a man from the exercise of his trade *for a certain time*, and in *a certain place*, when entered into upon fair and reasonable consideration, is good.
S. C. ante, 27.
S. C. post. 130.
S. C. Fort. 296.
S. C. 1. Peer. Wms. 181.
Cro. Jac. 739.
Cro. Eliz. 872.
Powell on Contracts, 169.
5. Term Rep. 118.

THAT the bond was void these cases cited:- 2. *Hen.* 5. 3. *Levinz*, 24. 3. *Cro.* 208. where if a sheriff take *a bond* for his execution fees it shall be void; but held that *a promise* would have been good.

ON THE OTHER SIDE *it was said*, that an infant could not, either by a parol contract or a deed, bind himself, even for necessaries, in a sum certain; for should an infant promise to give an unreasonable price for necessaries, that would not bind him; and therefore it may be said, that the contract of an infant for necessaries, *quatenus* a contract, does not bind him any more than his bond would; but only since an infant must live, as well as a man, the law gives a reasonable price to those who furnish him with necessaries. The case in the Year-Book of *Henry the Fifth* was but the extrajudicial opinion of a single Judge; and then it was a total restraint for a particular * [86] time, whereas this is but a restraint in a particular place. And for the case of execution fees, upon the statute of 29. *Eliz.* c. 4. it was to prevent oppression; for the sheriff might threaten the persons concerned, that he would not let them have the execution unless they would enter into such a bond.

THE JUDGES retained the same opinion they had in a former argument upon this case.

EYRE, *Justice*, said, that if the bond was void, the reason must be, because it was *malum in se*; and then several customs, which stand upon the same reason, and have been adjudged good, will be overthrown; and he was of opinion, that the jury had no more power in an *assumpsit*, where the promise was certain, to mitigate the damages, than they had in case of a bond; and if so, the reason of the difference between bond and *assumpsit*, that has been so much insisted on, falls to the ground (*a*).

(*a*) See same case, ante 27. and post. 130. where the Court delivered a unanimous opinion that the bond was good.

Widdrington

Widdrington *against* Charleton. Case 52.

Appeal for murder.

THIS was an appeal brought by the wife for the murder of her husband.

To which there was a demurrer.

Reeves *for the appellee* insisted, that as in the writ the "*t*" in the word "*appellat*" was turned up, the writ was insensible, and in the eye of the law no writ at all.

Cheshire *for the appellant* answered, that the turning up of the "*t*," being no known abbreviation, should go for nothing. 3. *Cro.* 182. 467. *Mich.* 1693. *Ball v. Roe.*

What shall be considered as a discontinuance.

Reeves *for the appellee* then insisted, that there was *a discontinuance*; for in *the exigent* the words "*de morte sui viri, unde eum* "*appellat*," were omitted; and therefore it did not appear that this *exigent* was sued out in this action.

* [87]

B. R. H. 39. 2. Bar. K. B. 348. 3. Atk. 570. 1. Stra. 155. 2. Stra. 989.

* Cheshire, *for the appellant* said, that this was an *exigent* sued out between the same parties that the *capias* was; and that there is no variance between *the capias* and *the exigent*, though there is something more contained in *the capias* than what is in *the exigent*. And upon prayer of *oyer* of mesne process in this action, this exigent was recited, and thereby admitted to be *the exigent* in this suit. He argued further, that this *discontinuance*, if it was one, was aided by appearance; and that the difference taken, that appearance and pleading-over aids *a discontinuance*, but not appearance and demurrer, was not law. 9. *Hen.* 5. *fol.* 2. 2. *Cro.* 284. *Roll. Abr.* 789. 4. *Co. Rep. Boyse's Case.* 1. *Ventris*, 7.

Adjournatur.

Rogers *against* Wood. Case 53.

Plea of a release of a recognizance bad.

A RELEASE OF A RECOGNIZANCE was pleaded to be, "*ante* "*emanationem scire facias.*"

This is naught; for it might be made before the action was brought, and the plea true, and then the release is void.

5. Co. 70. 1. Inst. 265. Goldsb. 166. Moore, 469.

MICHAELMAS TERM,

The Eleventh of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Justice*,

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir Thomas Powys, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*

Sir Robert Raymond, *Knt. Solicitor General.*

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*[88]

* Rush *against* Seymour. Case 54.

THE STATUTES OF AMENDMENT extend only to pleadings of *record*; therefore pleadings, while *in paper*, are amendable by common law (*a*). Anciently, all pleas were *ore tenus* at THE BAR; and then if any error was spied in them, it was presently amended. Since that custom is changed, the motion to amend, because all in paper, succeeded in the room; and it is a motion that the Court cannot refuse: but they may refuse it, if the party desiring it refuse to pay costs, or the amendment desired should amount to a new plea.

Amendments may be made by the common law while the proceedings are in paper.

1. Com. Dig. "Amendment" (A.).

(*a*) See Bondfield v. Milner, 2. Burr. 1098.

MICHAELMAS TERM,

The Eleventh of Queen Anne,

IN

The Court of Chancery.

BEFORE

Sir Simon Harcourt, *Knt. Lord Keeper.*
Sir Thomas Parker, *Knt. Chief Justice.*
Sir Thomas Trevor, *Knt. Chief Justice.*
Sir John Powell, *Knt. Justice.*
Sir John Trevor, *Knt. Master of the Rolls.*

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* Radcliffe *against* Roper. Case 55.

THIS being a case of consequence, SIR SIMON HARCOURT, *Lord Keeper*, was assisted by SIR THOMAS PARKER, *Lord Chief Justice* of the Court of King's Bench, SIR THOMAS TREVOR, *Lord Chief Justice* of Common Pleas, POWELL, *Judge* of the Court of Queen's Bench, and SIR JOHN TREVOR, *Master of the Rolls.*

The case in substance was thus:

A *Roman Catholic* devised his land to four trustees, two *papists* and two *protestants*, to be sold for the payment of debts and legacies; and by a codicil, amongst other legacies, he devised the remainder, whether in lands or personal estate, to two papists and their heirs.

The question was, Whether this was a good devise, so as to disinherit the heir at law, being a protestant, notwithstanding the 11. & 12. *Will.* 3. c. 4. made for preventing the growth of popery.

For the better understanding the force of the argument on each side the question, it will be proper to premise the aforesaid act.

In this case three points resolved: 1st, If an estate be devised to be sold for payment of debts, surplus to a Roman Catholic; that this surplus is in nature of a real interest, and as such void, by act of *King William*. Resolved, 2dly, That the word "purchase" in that act does include devise. Resolved, 3dly, That a subsequent devise to *A* though *A.* be incapable of taking, is a revocation of a precedent devise to *B*. S. C post. 230.—S C. 9 Mod 167 181. S. C 2. Eq. Ab. 508. 592. 620. 772. S C. 1. Bro. P. C. 450

By

RADCLIFFE *against* ROPER.

By the said act it is provided, "That from and after the twenty-
"ninth day of *September* 1700, if any person educated in the popish
"religion, or professing the same, shall not, within six months after
"he or she shall attain the age of eighteen, take the oaths of, &c.
"and subscribe, &c. every such person shall, in respect of him or
"herself only, and not to or in respect of any of his or her heirs or
"posterity, be disabled and made incapable to inherit or take by
* [90] "descent, devise, or limitation, in * possession, reversion, or
"remainder, any lands, tenements, or hereditaments; and that
"during the life of such person, or until he or she do take the said
"oaths, and subscribe, &c. the next of his or her kindred, which
"shall be a protestant, shall have and enjoy the said lands, tene-
"ments, and hereditaments, without being accountable for the
"profits by him or her received during such enjoyment thereof
"as aforesaid; but in case of any wilful waste committed on, &c.
"by the person so having or enjoying the same, &c. the party
"disabled, his or her executors and administrators, shall. recover
"treble damages for the same, &c. And that from and after the
"tenth day of *April* 1700, every papist, or person making pro-
"fession of the popish religion, shall be disabled, and is hereby
"made incapable, to purchase, either in his or her own name, or
"in the name of any other person or persons, to his or her use, or
"in trust for him or her, any manors, lands, profits out of lands,
"tenements, rents, terms or hereditaments; and that all and
"singular estates, terms, and any other interests or profits what-
"soever out of lands, from and after the said tenth of *April*, to
"be made, suffered, or done, to or for the use or behoof of any
"such person or persons, or upon any trust or confidence, mediately
"or immediately, to or for the benefit or relief of any such person
"or persons, shall be utterly void and of none effect, to all intents,
"constructions, and purposes, whatsoever (*a*)."

IT WAS ARGUED *in favour of the devise*, that there was nothing in the act to prevent papists from selling their lands; but the design of the act was rather to oblige them to sell, and turn their real into personal estate; for the continuance of ancient seats in the hands of papists was esteemed the chief bulwark and support of
* [91] popery, thither resorting jesuits, &c. * If a *Roman Catholic* may sell, he may certainly give away the money arising from the sale to a Catholic. If now a papist may do this in his life-time, why may he not, as to the reason of the thing, appoint this to be done by trustees after his death? If it be objected, that though the estate, being by the will appointed to be sold, must be in common law looked upon as personal estate, yet it is land in equity, because it is a known rule in equity, that the residuary legatees may come into the court of chancery, and pray that they may have the land, upon their paying the debts and legacies for payment of which the land was to be sold. It may be answered, that if a person has his liberty to take either land or money, the Court will not compel him to

(*a*) But see 18. *Geo.* 3. c. 60.

take

take the land; for where then would be his liberty? Besides, for the Court, as this case is, to decree him the land, were to take from him what the law allows him to take and enjoy, and give him that which an act of parliament disables him from taking, and consequently would altogether overturn the will of the testator. Neither is this the only case where this rule of equity may happen to fail; for suppose the surplus were devised to an alien, whom the law disables to take land, shall this Court decree him the land, *that* which the law will not suffer him to enjoy? Should this be esteemed as a real estate, it would follow that a *Roman Catholic* could not charge his lands with portions for younger children of his own persuasion, or payment of his popish creditors; because, by the same rule of equity, if the land were but sufficient for the payment of debts, &c. the creditor might come into a court of equity and pray the same thing. If it be objected, that the testator himself calls it land, for in the codicil he devises the remainder, "whether "in lands, &c.;" it * may be answered, that this was but the flourish of a lawyer's pen, and that if the will were complied with, there could be no remainder of any real estate. [92]

Thus far it was argued, upon supposition that a *Roman* Catholic was, by this act of parliament, disabled from devising real estates to a papist; but that he was not, it was argued to this effect: That this act of parliament, as to the first clause of it which respects those under the age of eighteen, did not create an absolute, but a conditional disability only, *viz.* if after the age of eighteen he did not do so and so, &c.; and if he did not, it did not even then create a total and absolute disability, but only made *quasi* a sequestration of the profits during life, or non-compliance. Then comes the second clause, which creates in every papist an absolute disability to purchase lands, &c. It is true, that, speaking as a common lawyer, the word "purchase" stands opposed to "descent;" so that whatever estate a man does not come to by descent, he does by purchase, and then purchase necessarily includes devise. But it is not always taken in such a comprehensive sense; and even in this court, the word "purchase" is frequently used by way of contradistinction to voluntary settlements. And that it is here to be understood in the vulgar and more common acceptation of the word, appears from the former clause, respecting infants; where the act makes use of the words "devise, limitation, and descent." Now had they understood the word "purchase" in the legal acceptation, that word alone might have supplied the place both of limitation and devise. Besides, the words in the act immediately subsequent to purchase, *viz.* "in his name, or to his use, &c." seem to restrain and confine the word "purchase" to some act * to be done by the party to whom the estate moves, and not from whom. And then for the third and last clause, *viz.* "that all [93] "and singular estates, terms, and other interests or profits whatsoever out of lands, from and after the tenth of *April*, to be made, "suffered, or done, &c.;" this clause shall not make a devisee a purchaser, because it is not an independent clause, but explanatory

RADCLIFFE *against* ROPER.

of the foregoing; the word "such" plainly coupling it to "that," to which it was only the addition of a penalty. For the preceding clause incapacitating a papist to purchase, it might be asked, But what if he should? Then comes this clause, and answers the question, saying, it should be void. To understand this clause in another manner were to set one part of the act at variance with the other. For whereas the first clause creates but a conditional disability of taking by devise, *viz.* if they do not so and so, after the age of eighteen, &c. this clause thus understood makes an absolute one.—All this was strengthened by observing, that penal laws must receive the most mild and favourable interpretation.

ON THE SIDE *of the protestant heir at law* it was insisted, that this was a real devise, or a devise of land. For as to the objection, that this Court could not, in this case, decree the land to the residuary legatee, because that would be for this Court to decree him what he is by this act unqualified for enjoying, it was answered, that before this act of parliament it would have been land in equity, and surely it cannot be pretended that there is anything in the act to alter it. It would be very strange if this Court should, after an act of parliament made for the preventing the growth of popery, make one rule for a protestant, and another in favour of a
[94] papist, and look upon the same devise as real if made to a protestant, but as personal if to a papist. As for the case put, of remainder to an alien, it was answered, that an alien may take, but not for his own advantage, but that of the crown, who, in that case, would have the land. Land would even, at common law, pass by the words "profits out of land," but here the testator himself, in his codicil, calls it land, which makes it a stronger case, and then the word "remainder," which imports a fee, according to *Lutwyche*, 762. and makes it go to the heirs, not to the executors, shews, that it has the nature of a real estate, and was esteemed of as such by the testator. As for the objection, that this would fall hard upon younger children and creditors of papists, it was answered, that the design of the act was to lay difficulties upon *Roman* Catholics. And besides, this case differs from that, because it was here the case of a residuary legatee, and whether as to creditors and younger children it might not be considered as personal estate, though real to the residuary legatee, and whether because the residuary legatees might pray to have the land, the creditors might do so too, the Counsel of the same side differed in opinion.

And because the Counsel for the protestant trustees had argued, that if the devise was void as to the popish trustees, the whole should go to them, IT WAS URGED by the Counsel for the protestant heir at law, that the codicil was a revocation of the will. And to this purpose 1 *Roll. Abr.* 614. was cited, where land is devised to one, and after the same land is devised to the poor of the parish, who are incapable of taking, and it was held, notwithstanding, the last devise was a revocation of the former.

As

As to the act of parliament, that a papist was disabled by it from taking land by devise, IT WAS ARGUED, * from the design of the act in general; which would be wholly vain, and by no means answer the end it was designed for, unless this interpretation was put upon it. Protestant heirs of popish ancestors will be always disinherited; and it will be very easy to conceal a gift under a devise; one need only suppose a papist makes his will, and enters into a bond not to revoke it. It seems strange to imagine the legislators intended to leave *Roman* Catholics free to take land by devise, a way that costs them nothing, and tie them up from taking land by purchase, a way in which they are to pay a valuable consideration for it. It had been a more reasonable intention to have incapacitated the papists from taking land this way, of all others. For making a will is a serious act, done often *in extremis*, at a time when men are more than ordinarily solicitous so to dispose of their possessions, as they think, and will be told, at least, by their priest, is most for the good of their souls, *viz.* to those of their own communion. Unless this interpretation prevails, grown papists will be in a better condition than those under age, which surely was never the intention of the law-makers.

RADCLIFFE against ROPER.

As for its being a penal statute; the question is not about extending penalties, but whether the act shall not be in a manner useless. Besides, penal laws made for the preventing public mischiefs, have been, and may be, extended. As the statute of 1. *Rich.* 2. that gives an action of escape against the warden of the *Fleet* only, extended, by equity, to all gaolers whatever. Statute of petty-treason for a servant to kill his master, extended to a mistress.

1. *Rich.* 2. Escape by equity.

Petty treason by equity.

The word "purchase" in a legal sense includes devise; and legislators may well be supposed to be acquainted with the legal import of words.

9. Mod. 177.

* But the third clause was that relied upon, which (it was said) was not explanatory, but an independent clause, referring to those above the age of eighteen. For as for the word "such," that did not make it explanatory of the preceding clause, but only referred it to the persons spoken of before, *viz.* persons professing the popish religion. And besides, it has a new commencement, a plain mark of its being a new independent clause. But supposing it an explanatory one, certainly the precedent clause is to be governed by the explanatory one, and not *vice versa.* And, without doubt, the words in the third clause do include devise; for the words "profits out of lands" may be construed of profits arising from sale, as well as continuing profits. Certainly a devise to a papist will fall under these words, "estates, terms, interests, &c." to be made, done, or suffered, to the use, benefit, and relief of papists.

* [96]

NOTE, It was said, that a purchase for a valuable consideration could not be included under the word "relief," because the worth being paid, it could not be deemed any relief; *contra* of a will.

In *Easter Term*, in the thirteenth year of *Queen Anne*, this cause came on again in the house of lords.

Post. 230. 1. Bro. P. C. 460.

MICHAELMAS

MICHAELMAS TERM,

The Eleventh of Queen Anne,

I N

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*

Sir Lyttleton Powys, *Knt.*
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Sir Thomas Powys, *Knt.* } *Justices.*

Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

Lord Lansdown's Case.

Case 56.

A codicil duly executed, with a design to the republication of a will, is a republication of the will, although the will was not re-executed pursuant to 29. *Car.* 2. c. 3.

THIS was an ejectment brought by three coheirs against *Lord Lansdown.*

Upon a trial at bar, two points arose, which at length came to be found specially, as appears from the following notes of what passed at the trial at bar.

The *Earl of Bath*, the common ancestor, made his will, dated the twenty-fourth of *October* 1684, under which will *Lord Lansdown* claims: This will was afterwards, in the year 1696, revoked by act in law, as to all the real estate devised by it, but not as to the personal. * Some years afterwards, the testator told *Mr. Nicholls*, who was then in the same coach with him, that he designed to republish his will; and the day afterwards, in the presence of several people, he brought with him his will in one hand, and two codicils of the same import in the other, and said, "*This* "is my will, by which I have settled my estate; and *this* I design "as a codicil to my will, to be taken as part and parcel thereof." Then the codicils were duly executed, according to the statute 29. *Car.* 2. c. 3. of Frauds and Perjuries; and the will and one codicil were sealed up in one paper, with the *Earl of Bath's* seal; and the other codicil in another paper, with the same seal; and

* [97]

S. C. Eq. Rep. 115.
S. C cited Comy. Rep. 384.

these

Lord Lansdown's Case.

these papers were, after his death, produced by those with whom they were deposited. Neither the will nor the codicil were read at the time of republication. But in the codicil he took notice of his will in the following manner: "WHEREAS I made my will "in 1684, which I do not intend wholly to revoke; but in re- "spect of many alterations since happening, &c."

The question was, Whether this amounted to a republication of his will, the will not being sealed and subscribed, as the statute 29. *Car.* 2. c 3. requires?

THE COUNSEL *for the plaintiff*, before it was found specially, spoke to this point to this purpose:—When the will was revoked, it became a mere scroll; a paper, indeed, in which there was writing, but of no force, and no more capable of becoming a will, than any other paper whatever. It was held (*a*), even before the statute of Frauds and Perjuries, that the inserting of a new legacy, or the making another executor, did not amount to a new publication. * [98] * It appears from the case of *Sir Litton Strode v. Lady Falkland* (*b*), that the making a codicil, *quatenus* a codicil, is no new publication; for in that case, a man by his will devises "all "his lands;" afterwards he purchases other lands, and after that he makes a new codicil to his will, executed according to the statute of Frauds and Perjuries; and whether this was a new publication of his will, so as to take in the lands after purchased, was the question; and it was resolved by LORD COWPER, *Chief Justice* TREVOR, and *Judge* TRACY, that it was not; for since the statute of Frauds, the same forms are necessary to the republishing of a will, as to the first making. In *Trevanion's Case* (*c*), a man holds up a paper, and says, "this is my will;" and it was held that these words did not make it his will, because it was not read; and this before the statute of Frauds. No parol declaration referring to a paper in writing, would make a republication, even before the statute of Frauds. This is plain from the case of *Bret v. Rigden* (*d*). And here is nothing pretended in writing, that imports a republication; for as for the words in the codicil, no one that reads them can think they do: and for the parol declaration, it was literally true; for it remained a will, as to his personal estate (*e*).

Case of Cotton v. Cotton, 2. Vern. 209. *contra*.

(*a*) 1. Roll. Abr 618.

(*b*) 2. Vern. 625 722. 3. Chan. Rep. 90. Powel on Devises 609.

(*c*)

(*d*) Plowd. 342.

(*e*) It is said, that THE COURT held, that the making of the codicil was no republication of the will, they not being affixed together. Simpson v Hornby, Prec. Chan. 441. S. C. Gilb. E. R. 115. 120. * S. C. 2. Vern. 722. and because since 29. *Car.* 2. c 3 there shall be no republication by implication, but the will must be re-executed; otherwise a devise of lands shall not be good, Acherley v. Vernon, Comy Rep. 385. But see Abney v. Miller, 2 Atk. 599: Martin v. Savage, 5. Mod. 78. Gibson v Montford, 1. Vezey, 485. Acherley v. Vernon, Comy Rep. 381.; in which last case it is held, that a codicil signed and published in the presence of three witnesses, is a republication of the will, and that both make but one will. S. C. 3. Bro. P. C. 107. See also Carlton v. Griffith, 1 Burr 554. Pollen v. Pollen, 1. Vezey, 437. 442.

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THE SECOND POINT was, that supposing the will republished, yet it could convey no title to the defendant, because he claims as issue male to the devisee in tail, *Bernard Granville*, who died, living the testator; and therefore it was a lapsed legacy (*a*).

If a devise is made to *A.* in tail male, and *A.* die in the life of the testator, a codicil, republishing the will, does not enable the issue in tail of *A.* to take under the devise.

THE COURT was of this opinion.

But THE COUNSEL insisting that this was a devise in tail, and therein different from the case of *Bret v. Rigden* (*b*); and that in this will the testator declares, that he so devised it "for the preservation of his name and family;" and that the republication was after the testator * knew of the death of *Bernard Granville*, and therefore could not intend that *Bernard*, who was dead, should take; and desiring, upon their reputation, a *special verdict*, it was granted (*c*). * [99]

THE COUNSEL for *Lord Lansdown* offered in evidence parol declarations of the testator, that it was his intention the issue male should take by the will.

Parol declarations not to be allowed as evidence to explain wills, unless in affirmance of the common law.

THE COUNSEL *for the plaintiff* opposed this;

And refused by THE COURT.

NOTE, The cases quoted as to this purpose were, *Molineux v. Molineux* (*d*); where it is held, that if a will refer to a thing in writing, it is altogether as good as if the writing referred to were inserted in the will *verbatim:* but that it is otherwise where the will refers to a parol declaration; for no regard is to be given to it, though it is referred to by the will (*e*). In the case of *Littlebury v. Buckley* (*f*), which was to this purpose, a rule had obtained in equity, that where there are specific legacies, and no residuary legatee, that there the *residuum* should be divided according to the statute of Distributions, contrary to the common law, which gives

2. Vern. 98. 337. 339.

(*a*) The *Earl of Bath*, after taking notice in this will, that his lands were settled upon his sons *Charles* and *John* in tail male, devised, "and in case my sons "shall have no issue, then for the pre-"servation of my name and family, I "devise my said lands unto my brother "*Bernard Granville*, and the heirs male "of his body issuing;" and *Bernard* died in the life of the testator, leaving issue *Lord Lansdown*, the defendant. Comy. Rep. 384.

(*b*) Plowd. 342.

(*c*) Cases cited in respect to this second point, were Fuller *v.* Fuller, Cro. Eliz. 422. which case is also taken notice of in Mod. Rep. Steed *v.* Burier, in which case, resolved by both Courts, that there is no difference between a devise in fee and in tail, as to this purpose.—NOTE *to the former edition.*—It is said, that the Court were clear in their opinion on this point, that the heirs male of *Bernard Granville* could not take, no more than, in the case of Steed *v* Burier, 2. Mod. 313. a grandson could take his son by the republication of the will subsequent to the death of the son: Simpson *v.* Hornby, Prec. Chan. 441. See also the case of Turner *v.* Kett, where it is determined, that if *A.* devise to *B.* and the heirs of her body, and for default of such issue, then over; and *B.* die in the Life-time of *A.*; and then *A.* by a codicil confirm his will; that the heir of *B.* takes nothing, though it appear that *A.* knew of the death of *B.* and of the birth of her son, before he made the codicil. 4. Term Rep. 601.

(*d*) Cro. Jac.

(*e*) See 2. Leon. 70. Cheney's Case, 5. Co. and Bertie *v.* Falkland, before Lord Somers.

(*f*)

Lord Lansdown's Case.

2. Vern. 648. 737. 9. Mod. 9.

it to the executor: now here the Court received parol evidence to prove it to have been the intention of the testator, that the executor should have the *residuum*; and that it should not be divided. But the reason why the Court did this, is expressly assigned to be, because it was in affirmance of the common law; whereas here the evidence is offered in contradiction to the common law, *viz.* to enable * [100] the issue to take *by purchase*, who by rules of common law was to take *by limitation*. This point was likewise fully settled in the case of *Litton v. Falkland* (*a*), that went through the house of lords. It was observed, that most of these cases, being before the statute of Frauds and Perjuries, stood only upon the statute for Wills in writing, and must receive an additional force from the statute of Frauds. Indeed if a man devise an estate to his son *John*, and there are two sons of that name, or if a man devise the manor of *Dale*, and there are two of that name; parol evidence shall be allowed to explain which of the two the testator meant. The reason of the law in this point is clear and strong; for if parol evidence be once allowed to explain a will, and give it another sense than what can be collected from the words of the will standing alone, what purchaser under a will can be safe? or what lawyer can give his opinion upon a point that depends upon a will (*b*).

2. Vern. 593.

A special verdict was found (*c*).

(*a*) 2. Vern. 624, 625.

(*b*) See Rashfield *v.* Careless, 9. Mod. 9. 2 Peer Wms. 158. Petit *v.* Smith, 1. Peer Wms. 7. Granville *v.* Beaufort, 1. Peer Wms. 114. Lake *v.* Lake, Amb. 126. Brown *v.* Selwin, Cases T. T. 240. Coote *v.* Boyd, 2. Bro. C. C. 525. Clinton *v.* Hooper, 3. Bro. C. C. 201. Hornsey *v.* Finch, 4. Bro. C. C. 239.

(*c*) This case was afterwards agreed between the parties, Prec. Chan. 441.

Case 57. The Queen *against* The Borough of Aldborough.

The taking the sacrament pursuant to the 13. Car. 2 c. is a precedent qualification to being elected a burgess of a corporation.

THIS was a *mandamus* to the mayor and burgesses of *Aldborough*, commanding them to restore one *Sparhawk* to the office of capital burgess of that borough.

To this they return, for cause of not obeying the writ, that he had not taken *the sacrament* within a year before the election, according to the statute of 13. *Car.* 2. c. 2. (*a*).

Sir James Mountagu objected to the return, that the act of 13. *Car.* 2. c. 2. as to taking the sacrament, was only directory, as to the electors, what sort of man they should choose, and did not make a nullity of the office. * [101] And to maintain this point, the case of *The King v. Larwood* (*b*) was quoted, which was an information against *Larwood* for not taking upon him the office of sheriff

(*a*) See The Queen *v.* The Corporation of Buckingham, post. 173.

(*b*) Hilary Term, 6. *Will.* 3. 1. Salk. 168. 3. Salk. 134. 4. Mod. 269. Skin. 574. Carth. 306. Holt, 505. Comb. 315. 2. Vent. 248. 12. Mod. 67. 1. Ld. Ray. 29.

of

of the city of *Norwich*, of which office he was capable; he pleaded to the information, that he had not taken the sacrament within a year, &c. and so was incapable; demurrer, and judgment on the side of the information. This is a case in point; for whether the not receiving the sacrament created an incapacity, was the foundation of the demurrer.

THE QUEEN *against* THE BOROUGH OF ALDBOROUGH.

THE COURT. This interpretation of the act was never off'red to any Court before the case of *Rex v. Whitehorn* (*a*); and should it prevail, the act would signify very little. As to the authority of the case of *The King v. Larwood*, it amounts to no more than this, that a man shall not defend one crime by another, *viz.* his not taking upon him the office, by his not receiving the sacrament (*b*).

A SECOND OBJECTION to this return was, that it did not shew that this corporation was in being at the time when this act was made.

Stat. 13. *Car.* 2. extends to all corporations created before and after that act.

Sed non allocatur: for the act extends to all corporations created before and after. 2. *Ventris* 243.

A THIRD OBJECTION to this return was, that it did not appear that the person was *summoned* to say what he could for himself.

The return to a *mandamus*, that the party had not taken the sacrament, ought to shew that he was *summoned* and *heard*.

TO THIS *it was answered*, that this return amounted to a special *non electus*, which must be as good as a general one, because it did imply it; and to prove a general *non electus* would have been a good return, these authorities were quoted: *Dunch v. The City of Norwich* (*c*), where the return was *non debito modo electus*; and held there indeed, that the *debito modo* was * wrong, because it made the party a judge of the legality of the choice; but without that the return had been good. In *Farrington's Case* (*d*), the return was *nunquam fuit electus et perfectus*; and leave was given to amend the return, by striking the *perfectus* out.

Vide Salk. 436.

* [102]

PARKER, *Chief Justice*. I think it very proper a corporation should hear a man before they expel him. There can be no inconvenience in holding corporations to this, for it can only keep those in that are qualified to stay in: and if corporations will unjustly, after hearing, expel men, it aggravates the fault, because done against knowledge. It is true, the party has an action to be restored; but then, in the mean time, he is wrongfully kept out.

POWELL, *Justice*. It is very reasonable that corporations shall do this; but whether by law we can oblige them to it, is the question. If a general *non electus* had been a good return, why not that which amounts to a special *non electus*? Surely the adding the reason does not make the return worse.

No opinion given in this point.

(*a*) Ante, 64.

(*b*) See statute 5. *Geo.* 1. c. 6. and the case of Harrison *v.* Evans, Cowp. 393 *notis.* Kyd on Corporations, 352-368.

(*c*) Easter Term 1706. 1 Sid. 209. reported likewise 1. Keb. 716.

(*d*) 1. Show.

Parker

Case 58. **Parker *against* Lilly.**

If, after assignment of a *bond*, the assignor give a *warrant of attorney* to acknowledge satisfaction upon record, this is relievable only in chancery.

A MAN assigns his bond to *B.* *B.* sues this bond in the names of the assignor, and has judgment. On a writ of error brought, the judgment is affirmed; and after execution is taken out, but before it was returned, the assignor gives a warrant of attorney to confess satisfaction upon record, which is accordingly done, and upon this a *supersedeas* is taken out to stop the execution.

* [103]

S. C. 2. Eq. Abr. 543.

It was moved to set aside the *supersedeas*, * because after assignment the Court will not suffer the assignor to give a warrant of attorney to acknowledge satisfaction; and for this 1. *Keble*, 803. was quoted.

But, as to this, it was said, that the assignment was matter of equity, and was more proper for chancery than for this court; and a late case was quoted in the common pleas, where a bond was taken in trust for another, and the obligee dying while the suit upon this bond pended, it was held that the *cestuy que trust* could not go on in the action, because this Court could not take notice of the trust, or of any other plaintiff than who appeared to be so upon record.

And of this opinion was THE COURT.

Whether after execution a *supersedeas* can issue without a Judge's hand.

IT WAS FURTHER INSISTED, in favour of the motion, that after execution was gone out, it was not regular to grant a *supersedeas* without a Judge's hand.

THE COURT took time to inquire into the practice.

Case 59. **Ongly *against* Peed.**

A devise to *A.* and his two brothers *successivè*, is not void for uncertainty; for the law directs who shall take first.

S. C. 2. Ld. Ray. 1312.
S. C. 2. Eq. Abr. 358.
S. C. Comy. Rep. 297.
S. C. 8. Viner, 49.
4. Burn E. L. 126.

THIS was A WRIT OF ERROR out of the common pleas.

THE CASE was no more than this: A man devised his land to *A.* and his brothers *successivè*; but not to be entered upon or enjoyed by any of them until after marriage. *A.* was by the verdict found to be the eldest brother: and, Whether this will was void by reason of the uncertainty who should take? was the question.

THE COURT were all of opinion, that the will was a good will, and certain enough; for being in the case of brothers, the common law was a guide to the exposition of the word "*successivè*," VIZ. that the eldest should, after his * marriage, enjoy it first for his life, then the second, and then the third; especially when he who was named in the will, is by the verdict found to be the eldest brother:

* [104]

ther: had the devise been to *A. B.* and *C.* to take *successivè*, it would have been void for the uncertainty (*a*). Onely *against* Pied.

(*a*) The cases quoted in the argument were, Wiscombe *v.* Hobart, Hob. 313. S. C. Cro. Eliz. 57. S. C. Godb. 51. S. C. Hutton, 87. Mellow *v.* May, Moor, 636. Forrett *v.* Frampton, Stiles, 434. Bate *v.* Amherst, Raym. 82 and Co. Litt. 377.—Note *to former edition.*

Sawkill *against* Warman. Case 60.

When the plea should be *actio non accrevit infra sex annos*, instead of *non assumpsit*.

THIS was an *insimul computassent*: the count upon which the question arose was, that upon an account taken the ninth of *January*, the defendant appearing to be indebted to the plaintiff in the sum of one hundred and fifty pounds, promised payment upon the thirtieth of *January*.

The defendant pleaded *non assumpsit infra sex annos*.

To this it was demurred, because the six years are to be computed from the time of the performance, and not of the promise; and therefore this plea might be true, and yet the plaintiff not barred by statute of limitations; and therefore the plea should have been *actio non accrevit infra sex annos*.

And of that opinion was THE COURT.

In *Hilary Term* following there was another case, parallel *in omnibus* (*a*).

(*a*) See the case of Shutford *v.* Perow, 871. 1. Mod. 89. Could *v.* Johnson, Cro. Car. 139. Buckler *v.* Moor, 2. Keb. 2. Ld. Ray. 823.

The Queen *against* The Inhabitants of Ware. Case 61.

A rate cannot be made to reimburse an overseer of a former year.

IN *Tawny's Case* (*a*), which does not materially differ from this, the question was, Whether a rate might be made to reimburse an overseer of a former year? and resolved it could not; and upon this ground, that the present inhabitants are by law bound only to the maintenance of the present poor; for at that rate nobody that comes into a parish, can tell what he is to trust to (*b*).

S. C. Sett. & Rem. 48. S. C. Foley, 10. S. C. 1. Bott P. L. 272.

(*a*) Salk. 531. Ld. Raym. 1011. 6. Mod. 98.
(*b*) See 17. *Geo.* 2. c. 38. s. 11.; and Mr. Const's edit. of Bott's Poor Laws, 274.

*[105]

* The Company of Stationers *against* Partridge. Case 62.

The Company of *Stationers* has not an exclusive right to print *almanacks*.—S. C. 2. Chan. Cases, 66. 76. 93. 2 Show. 258. 2. Bl. Rep. 1004. Lilly Ent. 63. 1. Mod. 256.

THIS was a point of law, directed out of the court of chancery, for the opinion of the Judges of the court of king's bench.

The Company of Stationers *against* Partridge.

THE QUESTION was, Whether the grant of the crown, to the *Company of Stationers*, to have the sole printing of *almanacks*, provided they were licensed by the archbishop of *Canterbury* and bishop of *London*, were a good grant; or void, because against the liberty of the subject?

IT WAS ARGUED *against the patent*, that printing was a handicraft trade, and therefore no more to be restrained than other trades; for to say that the crown has a power over all trades, that may prove *malum per accidens*, would carry the prerogative of the crown nobody knows whither. Where the crown has no right of copy, it cannot appropriate the printing to particular persons; but where the crown has a right to the copy, there it may; as in the case of the translation of the *English Bible*, and *the Year-Books*. The king has an interest in the *Statute Book* (*a*); and the same may be said of the *Book of Common Prayer*. In *Seymour's Case* (*b*) it is indeed said, that *an almanack* is but a copy of the calendar, out of the Book of Common Prayer. In answer to this, *res altiùs repetenda*, before the Reformation, the Book of Common Prayer was subject to the alteration of THE ORDINARY; and there were almost as many Common Prayer Books as dioceses, as appears from *Lindwood* (*c*). Every bishop had the appointing of the feasts that were to be observed in his own church and diocese. In the *Year-Book* of *Henry the Seventh* (*d*) it is said, that the * calendar is of no
* [106] authority. So that before the Reformation, the calendar could be no creature of State; and as for the almanack's being said to be a copy of the calendar, there is no reason for it; indeed both are registers of time, the one for prophane, and the other for sacred uses.—Then it was argued, that THE PATENT was void, because introductory of a monopoly. Monopolies are said to be contrary to MAGNA CHARTA (*e*). The liberty of the subject was precarious, before MAGNA CHARTA (*f*). That statute does not annul monopolies then in being, but prevented any more. A grant to make all playing-cards, has been adjudged to be a monopoly (*g*).

IT WAS ARGUED *for the patent*, that the crown had a peculiar right and interest in the Book of Common Prayer, and consequently in the calendar, which is a part of it; and the making some additions to it, shall not devest the crown of their interest in it. Since the art of printing was found out, it has been more under the care of the crown than any other art whatsoever. FIRST, Because it was an art introduced by the care of the crown; so said in *Carter's Case* (*h*), which gives the crown a property in the trade. SECONDLY, Because of the greatness of the inconvenience that may redound to the public from the mismanagement of the

(*a*) See the case of the Stationers Company, 2. Char. Cases, 70.

(*b*) 1. Mod. 256.

(*c*) Lind. Oxford edition, 1?3.

(*d*) 9. Hen. 7. pl. [illegible]

(*e*) 2. Inst. 47. See also Register, 105, 107. about monopolies.

(*f*) Moor, 674.

(*g*) Darcy *v.* Allen, 3. Mod. 76.

(*h*) 2. Keb. 731.

press.

The Company of Stationers against Partridge.

press (*a*). On a controversy about the printing of *Rolle's Abridgment*, it was decreed in chancery in favour of the patentees, and this decree was confirmed in the house of lords (*b*). In a question about the patent for the sole printing of all *law books*, judgment was given against the patentee in the court of king's bench, for the uncertainty of what should be esteemed a law book; but this judgment was reversed in the house of lords (*c*): *Seymour's Case* (*d*) is full in point, where the same objections were made as here. In the case of *The Company* * *of Stationers v. Skinner* (*e*), the patent was allowed for Primers, Psalters, Psalms and Almanacks. In the case of *The Company of Stationers v. John Gale* (*f*), there was no decree indeed for printing Psalms, Psalters and Almanacks, but the reason was, because the person controverting the patent submitted without. In the case of *The Company v. Wright* (*g*), a patent for printing the Psalms was allowed. In the case of *The Company of Stationers v. Lee* (*h*), another patent for Psalms was allowed; and in the case of *The Company v.* ——, a patent for Almanacks (*i*). In the statute 9. *Anne*, c. 20. this very patent now in question, is taken notice of. * [107]

The Court. The patent for the sole printing of law books is not now to be shaken, having had the sanction of the house of lords: monopolies are odious; this case, therefore, is to be distinguished, by deriving to the crown some special interest in *almanacks*.

No opinion was given; but the case was ordered to be spoke to again (*k*).

(*a*) Carter's Rep. 89.
(*b*)
(*c*) See Roper v. Streater Skin. 234. and the case of Basket v. University of Cambridge, 1. Bl. Rep. 120. 4. Burr. 2316.
(*d*) 1. Mod. 256.
(*e*) 3. Keb. 792.
(*f*)
(*g*)
(*h*) 2. Show. 258. 2. Ch. Cases, 66.
(*i*)
(*k*) As the Company of Stationers founded their claim in the right of the crown, the Court thought that it was incumbent on them to shew, that the crown had some property in the printing of almanacks, and the case stood over to afford them that opportunity, 4. Burr. 2329, 2382. But there never was any judgment or opinion given in this case. See Lord Mansfield's account of this case, 4. Burr. 2402. In the year 1775, however, the question was revived in the case of The Stationers Company v. Carnan, and on a case stated out of chancery for the opinion of the court of common pleas, De Grey, Ch. Justice, Gould, Blackstone, and Nares, Justices, certified, First, "That the grant made to the "plaintiffs, the Stationers Company, was "restrained to such almanacks and prog- "nostications as should be licenced or al- "lowed by the *Archbishop of Canterbury*, "the *Bishop of London*, or either of them, "for the time being."—And Secondly, "That the Crown had not a prerogative "or power to make such grant to the "plaintiffs, exclusive of any other or "others." 2. Black. Rep. 1004.

The Queen *against* The Mayor and Burgesses of Pomfret.

Case 63.

A return to a mandamus, that the party removed was duly elected; that he was removed for non-attendance; and that his election was void by his not having taken the sacrament; is bad for its repugnancy.

THIS was *a mandamus*, directed to the mayor and burgesses of *Pomfret*, to restore *William Lee* to the office of burgess.

THE QUEEN *against* THE MAYOR AND BURGESSES OF POMFRET.

They returned, that he was such a day *electus et perfectus*; and shew for cause of removing him, his *non attendance at the sessions*; and then they say, that he had not taken *the sacrament* within a year before his election, and that therefore his election was null and void.

THE COURT was of opinion that this return was bad, by reason of the repugnant and contradictory matter contained in it.

[108] * For, FIRST, they return, that he was such a day *electus et perfectus*; then shew for cause of removing him, his not attending at the sessions, according to his duty; and then shew matter that proves him never to have been elected; and consequently, that it was so far from being his duty to attend, that it would have been an act of presumption for him to have done it: and though several causes may be returned, yet they must not contradict one another; according to the case of *Dumb v. The City of Norwich* (*a*).

Non-attendance at the sessions no cause of forfeiture of a corporate office.

SECONDLY, They held, that *non-attendance at the sessions* was not a good cause of removal: for though they agreed the difference taken, 9. *Co. Rep.* 99. between public offices, that concern the administration of justice, and private offices, *viz.* that *non user*, in the one, is no forfeiture without a request, and some special loss occasioned thereby, as it is in the other; and that the office of burgess is a public office, &c. yet this case was different; for the absence of a single alderman does not hinder the holding of courts, or the validity of the acts of that court; so that here absence does not amount to a *non user* of the office (*b*).

The 9. *Ann.* c. 20. makes no difference in *returns* to *mandamus's*.

THE COURT was likewise of opinion, that returns to *mandamus's* were to be kept to the same strictness, since the *mandamus act* 9. *Ann.* c. 20. as before.

Peremptory *mandamus* granted.

(*a*) 1. Salk. 436. and see the cases of Wright *v.* Fawcett, 4. Burr. 2041. Rex *v.* Churchwardens of Taunton, Cowp. 413. Rex *v.* Mayor of Cambridge, 2. Term Rep. 456. Rex *v.* Lyme Regis, Dougl. 157. Rex *v.* Mayor of York, 5. Term Rep. 66.

(*b*) See Serjeant Whitaker's Case, Salk. 434. Rex *v.* Carlisle, 1. Stra. 385. Rex *v.* Mayor of Leicester, 4. Burr. 2087. Rex *v.* Wells, 4. Burr. 1999. Rex *v.* Richardson, 1. Burr. 517.

MICHAELMAS

MICHAELMAS TERM,

The Eleventh of Queen Anne,

AT

The Sittings

IN

The Guildhall of London,

BEFORE

Sir Thomas Parker, *Knt. Chief Justice.*

Stennil *against* Brown.

Case 64.

A CONDEMNATION of a ſhip as prize, in the admiralty court of *France*, was attempted to be proved by *a copy* of the condemnation, ſubſcribed by the officer of the court.

The ſentence of a foreign court of admiralty cannot be given in evidence, except under the ſeal of the Court.

But PARKER, *Chief Juſtice*, who tried the cauſe, would admit of no evidence, but an *exemplification* * of the condemnation under THE SEAL of the court. A copy of a rule of court, ſigned by the officer of the court, is no evidence in any other court, unleſs the Judge of the court ſet his hand to it himſelf; but at *Niſi prius* the hand of the officer is enough (*a*), becauſe it is the ſame court.

* [109]

Bull. N. P. 226. Sayer, 297.

(*a*) Bull. N. P. 229. 2. Ld. Raym. 743.

Nickſon *against* Brohan.

Case 65.

A MASTER ſent his ſervant, who was uſed to tranſact affairs of that nature for him, on *Saturday morning*, with a note drawn upon *Sir Stephen Evans*, with orders to get from *Sir Stephen*

If a maſter ſend a clerk, who has the general management of his caſh concerns, with a note to a banker to receive the money, and the ſervant, inſtead of ſo doing, gets another perſon to give him a draft upon the banker for it, and the banker fails before the draft is preſented, THE MASTER is liable for the loſs — 3. Bac. Abr. 562. 1. Stra. 415. 2. Wils. 353 3 Burr. 1516. 1. Bl. Rep. 485. 3. Term Rep. 760.

either

NICKSON *against* BROHAN.

either bank bills, or money, and turn them into exchequer notes; but the servant having other business of his master's upon his hands, to save himself the time and trouble of going to *Sir Stephen*, went to *B.* and prevailed with him to give him a bank bill for the note upon *Sir Stephen*; and then in pursuance of his master's orders, invested it in exchequer notes, which he brought to his master, not letting him know but that he had gone to *Sir Stephen*. *Sir Stephen Evans* failed upon the *Monday* following.

The question was, Upon whom this loss should light, *B.* or the master?

PARKER, *Chief Justice*, who tried the cause, was first of opinion that it should fall upon *B.* because the servant acted directly contrary to his master's orders, and *B.* by furnishing the servant with a bank bill, did the master no service at all; for if he had not done it, the servant must, in obedience to his master's orders, have gone and received himself the money from *Sir Stephen*; and cited

* [110] the case of *Ward v. Evans* (*a*), where it was resolved, * that if a servant, sent to receive money, takes a bill in lieu of it, the master is not bound by the act of the servant, unless the bill is answered.

But one of the jury informing him that he took the practice to be otherwise (for that whether a servant used to act upon the credit of his master, went against the orders of the master, was a fact that could not be known to a third person), he quitted his opinion; but directed the Counsel to move the court of king's bench, which was accordingly done.

The substance of what was said upon the motion, in favour of the master was, that the servant going contrary to his orders, and there being no subsequent consent of the master, who knew nothing of the matter, the act of the servant should not bind the master, according to the cases of *Ward v. Evans* (*b*), *Hanky v. Watts* (*c*), and *Thorold v. Smith* (*d*). A master commands his servant to sell his horse, the servant sells him as a good one, no action against the master (*e*).

(*a*) 1. Salk. 442. 2. Ld. Raym 928. Comy. Rep. 138. 6. Mod. 36. 3 Salk. 118. 12 Mod. 521. Holt, 120.

(*b*) Salk. 442.

(*c*)

(*d*) 10. Mod. 71. 87. Holt, 462. See the case of Southern *v.* How, Cro. Jac. 471.

(*e*) See Godb. 360. 2. Roll. Rep. 270. 1. Roll. Abr. 95. and the case of Fenn *v.* Harrison, 3. Term Rep 760. in which last case ASHHURST, *Justice*, says, "I take the distinction to be, that "if a person keeping livery-stables and "having a horse to sell, direct his servant "not to warrant him, and the servant "nevertheless warrants him, the master "will be liable on the warranty, because "the servant was acting within the gene- "ral scope of his authority, and the pub- "lic cannot be supposed conversant of "any private conversation between "the master and servant: but if the "owner of a horse were to send a stranger "to a fair, with express directions not "to warrant the horse, and the latter "acted contrary to the orders, the pur- "chaser could only have recourse to the "person who actually sold the horse, and "the owner would not be liable on the "warranty, because the servant was not "acting within the scope of his employ- "ment; for there is a wide distinction "between *general* and *particular* agents."

But

But THE COURT were all of opinion, that the verdict was well given, and that the master was chargeable, and he only; for a servant, by transacting affairs for his master, does thereby derive a general authority and credit from him; and if this general authority should be liable to be determined for a time, by any particular instructions or orders, to which none but the master and servant are privy, there would be an end of all dealing but with the master. The master has put himself in the power of the servant, by trusting him with the bill. The case of *Monk v. Clayton* (*a*) was, where the act of a servant, though out of place, bound his master, by reason of the former credit given him by his master's service, the other not knowing that he was discharged. And as for the cases put, there was this main difference between them, that nothing came to * the master's use; as here the notes did. In some of those cases there was a prior debt, but none here. It was agreed by the Court, that the property of the note was not transferred and vested in *B.* but was only in nature of a *depositum* or security to him, for there is no indorsement; nor could he have sued upon the bill; and though practice cannot alter the law, yet it may explain an agreement. They were likewise of opinion, that the master could not recover it of the servant, the loss being occasioned by a mere accident, and not either folly or negligence. If a master frequently send a servant to market without ready money, so that the servant is trusted upon the master's account; if, in such a case, the servant embezzle the money when he is sent with it, and buy upon trust, the master is chargeable; but not if he always is sent with ready money (*b*).

NICKSON *against* BROHAN.

[111]

(*a*) Molloy, 270. Cun. on Bills, 140. notice –

(*b*) See Southby *v.* Wiseman, 3. Keb. 625. Hazard *v.* Treadwell, 1. Stra. 506. Kendal *v.* Andrews, Espn. Dig. 115.

Arne *against* Johnson.

Case 69

Action for words.

AN ACTION was brought for these words spoken of an upholster: "You are a soldier, I saw you in your red coat doing duty; "your word is not to be taken."

The words were ruled to be actionable; because it is known to be a common practice for tradesmen to protect themselves against their creditors by a counterfeit listing; nor can it be worth a tradesman's while for any other purpose, but to defraud his creditors, by subjecting himself to the power of an officer. A soldier has by act of parliament, which the Court must take notice of, the privilege of not being held to special bail; and those words, "your word is "not to be taken," are plainly an inference from the former.

Case 67.

Alice *against* Gale.

To *sci. fa.* there may be plea in bar or abatement.

FIRST, A man may plead in bar, or in abatement to a *scire facias*, as well as to other actions.

It is the conclusion, not the matter of the plea, that makes it a plea in abatement, or in bar. Show. 4.

SECONDLY, It is the conclusion of a plea, and not the matter of it, that makes a plea in abatement: so that should a man plead a plea, that for the matter of it might have been pleaded in bar, and conclude *petit quod breve cassetur*, it would be but a plea in abatement; and the judgment could be no other than a *respondeas ouster*. So *vice versa*, a plea in abatement pleaded in form of a plea in bar, would be a plea in bar, though an ill one.

Conclusion to a bar in *scire facias*. 3. Term Rep. 185.

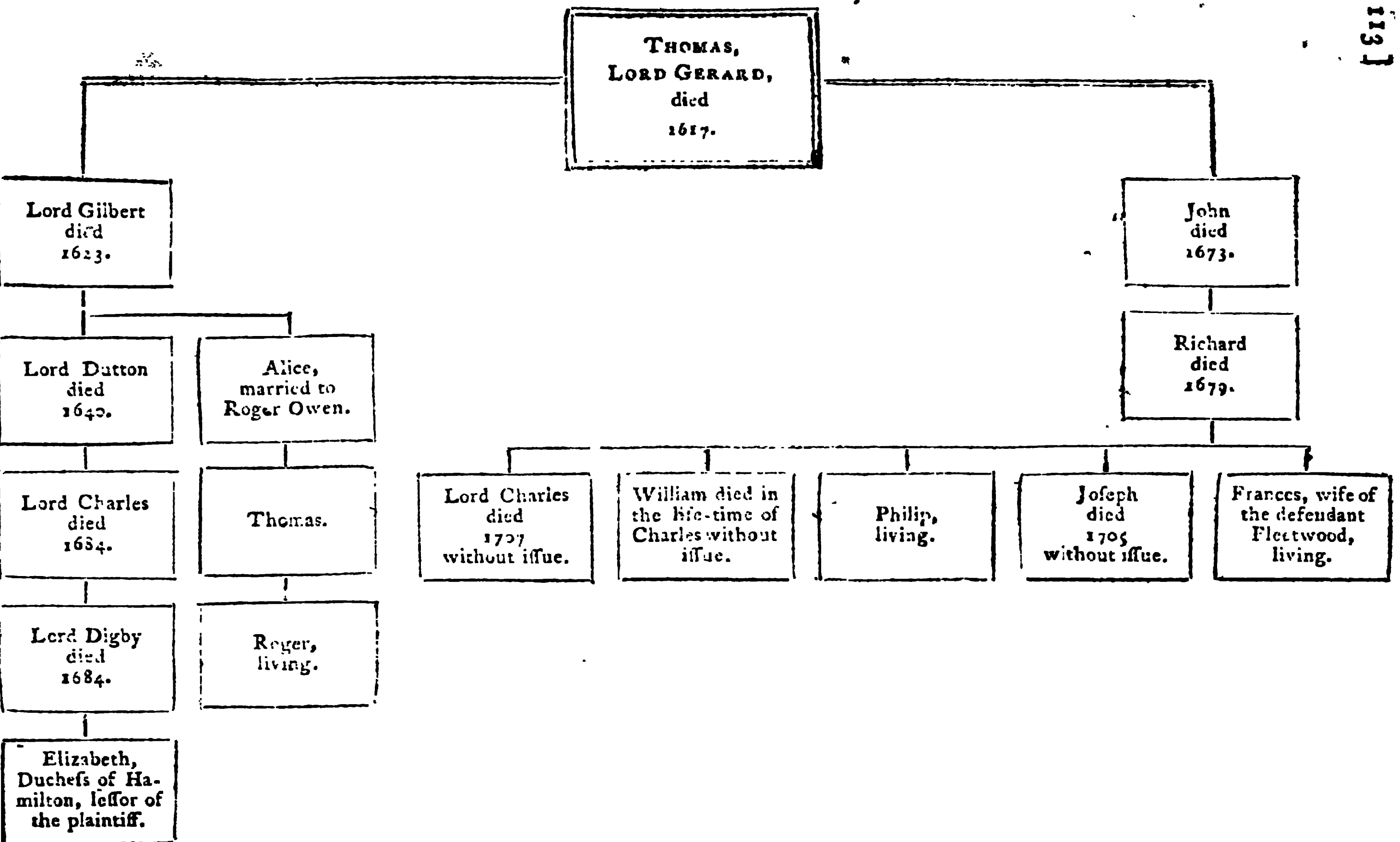
THIRDLY, To a *scire facias*, the plea in bar is always concluded by an *executio non*, as in other cases by an *actio non*.

Discontinuance. Carth. 107. Salk. 177. 218. 5. Bac. Abr. 8vo. 28. 1. Wils. 302.

FOURTHLY, If a defendant plead a plea in abatement, and the plaintiff reply as to a plea in bar, this is a discontinuance.

HILARY

PEDIGREE OF THE CASE FOUND BY THE JURY.



HILARY TERM,

The Eleventh of Queen Anne,

IN

The Common Pleas.

Thomas, *Lord* Trevor, *Chief Justice.*
Sir John Blencowe, *Knt.*
The Hon. Robert Tracy, } *Justices.*
Robert Dormer, *Esq.*
Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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*[114]

Case 68.

* Thornby, on the demise of the Duchess of Hamilton, *against* Fleetwood.

A common recovery suffered by a papist tenant in tail, for the purpose of making a marriage settlement, is good, for he is not "a purchaser" within the statute 1. Jac. 1. c. 4. s. 6.

S. C. post. 356. 406. S. C. Comy. Rep. 207. S. C. 1. Stra. 318. S. C. 2. Bro. P. C. 203. 11. Mod. 355. Harg. Co. Lit. 132. notis. 2. Peer Wms. 362.

THIS was an ejectment in the court of common pleas, which ended in a special verdict.

The jury found, that *Charles*, the first *Lord Gerard*, in the month of *November* 1660, settled the estate in question, to the use of himself and the heirs males of his body, with remainder * to the heirs males of the body of *Thomas* first *Lord Gerard*, remainder to his own right heirs. In the year 1684, *Charles*, the second *Lord Gerard*, upon the death of *Digby*, *Lord Gerard* (only son of *Lord Charles*) without issue male, entered upon the estate in question (not in jointure), claiming the same as heir male of the body of *Thomas*, the first *Lord Gerard*, by virtue of the said limitation in that settlement; and by virtue of this title enjoyed this estate above twenty-two years, and the residue when the jointure fell in; and during the time of this his enjoyment, suffered several recoveries, and settled the estate upon his marriage in the year 1689, and died without issue in the year 1707, leaving *Philip*, his only brother then surviving, who is heir male of *Thomas*, first *Lord Gerard*, and is now living. *Charles* and his brother *Philip* were, in the year

THORNBY ON THE DEMISE OF THE DUCHESS OF HAMILTON, *against* FLEETWOOD.

year 1676, sent by their father to *St. Omers*, and educated there for five years in the *Roman* religion, which religion they professed. The last *Lord Charles* died in the year 1707, and upon his death the *Duchess of Hamilton* claimed the estate, as right heir of the first *Charles Lord Gerard*; notwithstanding the estate-tail, limited to the heirs males of the body of *Thomas*, the first *Lord Gerard*, still subsists in *Philip*; alledging, that the last *Lord Charles* and his brother *Philip* being sent abroad, and educated in a popish seminary, are made so utterly incapable of taking any estate, that she has the right of entry.

THE GRAND QUESTION was, Whether one brought up in a popish seminary, was, notwithstanding any incapacity by him incurred on that account, still capable of suffering a common recovery?

SIR THOMAS POWYS, *for the plaintiff*, insisted that the statute 1. *Jac.* 1. c. 4. incapacitated a person sent beyond sea, not only from a pernancy of the profits, but from having the estate ever
*[115] vested in him; and * that this statute, as to this point, stood unimpeached by the subsequent statutes of 3. *Jac.* 1. c. 5. and 3. *Car.* 1. c. 2. (*a*). In the case of *Day v. Savage* (*b*) it is indeed said, that an act of parliament may be void from its first creation, as an act against natural equity; for *jura naturæ sunt immutabilia, sunt leges legum.* But this must be a very clear case, and Judges will strain hard rather than interpret an act void *ab initio.* The words of the 1. *Jac.* 1. c. . as to the incapacity are, "shall be "incapable in respect of himself only, but not his heirs or poste-"rity, to have, inherit, or enjoy, any lands, tenements, goods, "chattels, &c." words so comprehensive, as must take in all manner of ways whereby an estate can vest in a man, unless restrained by some after-limitations. Now the words of restriction or limitation are those, "in respect of himself only, but not his "heirs or posterity." This rather confirms the disability in him, according to the known rule, that *Exceptio firmat regulam in rebus non exceptis*; and though a saving may qualify and restrain the purview, yet it was never allowed to overthrow it quite. The purview says, "he shall not have, enjoy, inherit;" the saving, as is pretended, says, "he shall." This interpretation quite overthrows the intention of the restriction itself: for it was a saving intended in favour of the issue and posterity; but according to this interpretation, the saving is fatal and prejudicial to them; for it gives the person so educated a power of alienating, which power he will very probably execute in case of a protestant posterity; whereas, according to our interpretation, the estate never vesting in him, he cannot alien. As to the question that will be asked, Who shall have the estate in the mean time, if he is not to have
*[116] it, and yet his issue, if he should have any, must have * it after his

(*a*) But see now the 13. *Geo.* 3 c. 60. and 31. *Geo.* 3. c. 32.

(*b*) Hob. 87.

death?

death? I answer, There is a difference when the incapacity is in him, who is to take by *purchase*; and when in him, who is to take by *descent*. For where the first purchaser is incapable, there none shall take that must derive their title under him; but where the incapacity happens in course of descent, there the estate will go over to him to whom it should go, if the person made incapable were really dead. A tenant in tail has issue two sons; the eldest is *a monk*, or *an alien*, or abjures the realm; in all these cases the younger brother shall inherit (*a*). In *Lord Delaware's Case* (*b*), it is true indeed, that he did not sit in the house of lords in his father's life-time; but to this it may be answered, that it did not appear the son ever attempted it (*c*), and so brought it legally in question; and that there is a great difference made between a title of honour, which may be suspended, and a freehold, which cannot. Had our case been that of a heir, there had been more difficulty in it, because of that maxim in law, *Non est hæres viventis*; though even then the word "heir" may, in an act of parliament, be understood in the vulgar acceptation of the word, *viz.* "heir apparent." It may be objected from the clause, "that if such a one shall conform, &c. that from and during the time of such his conformity, he shall be freed and discharged from the afore-mentioned incapacity," that this proves the estate to have been in him before. But to this it is answered, that the intention of the proviso was, that after the time of his conformity, he shall be capable of taking any estate that should afterwards come to him; not that he shall then have that very estate, which at the time when it descended he was incapable of taking, and by reason of this incapacity never vested in him, and was now actually vested in another. But, admitting that to be the meaning of the proviso, the inference is by no means just. For nothing is more common * than for estates to devest out of one, and vest in another; as where a man dies, leaving his wife big with a son, &c. (*d*). *It was urged further in favour of this interpretation, that the very same words that were made use of with respect to disabling him in real estate, were made use of to disable him in personal estate, and that therefore they must have the same interpretation; but to understand them of taking the profits of goods, money and chattels, &c. is absurd. It was said, that this interpretation was more agreeable to common sense, and what every body but a lawyer would make. It was observed, that the other interpretation quite took away the penalty of the act; for who will be at the cost and trouble of a suit to hinder such a person from enjoying the profits, when by alienation he may in a moment exclude him from all advantages of his suit? *Summa est lex quæ pro religione facit*; acts of parliament made for the advancement of religion, must receive as strong an interpretation for the attainment of that end as possible (*e*); and surely, it cannot be doubted but the act we are now upon is such a one. Again, it

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(*a*) Belknap's Case, Co. Lit. 132.
(*b*) 11. Co.
(*c*) Co. Lit. 155.
(*d*) The case of Lincoln College, 3. Co.
(*e*) Hob. 157.

THORNBY, ON THE DEMISE OF THE DUCHESS OF HAMILTON, *against* FLEETWOOD.

it is another maxim, that acts of parliament made for preventing of public mischief, though penal ones, may yet be extended by equity; and this act of parliament may likewise be considered under this notion too, Popery being a conspiracy against the State, as well as religion. It is a rule both in civil and common law, that *In dubio, hæc legis constructio quam verba ostendunt:* so that, *cæteris paribus*, our interpretation is the better, because most literal.

It was in the next place argued, that this act 1. *Jac.* 1. c. 4. stood unimpeached and unrepealed, as to this point, by the statute
[118] of 3. *Jac.* 1. c. 5. or 3. *Car.* 1. c. 2.—* It must be admitted, that the rule, *Posteriores leges prioribus derogant*, is a true rule: but then at the same time it must be remembered, that these repeals by implication are things disfavoured by law; never allowed of but where the inconsistency and repugnancy is plain, glaring and unavoidable. For these repeals carry along with them a tacit reflection upon the legislators, that they should ignorantly, and without knowing it, make one act repugnant to and inconsistent with another; and such repeals have been ever interpreted so as to repeal as little of the precedent law as is possible (*a*). From the occasion of making the act 3. *Jac.* 1. c. 5. *viz.* the *Gunpowder Treason*, it could be no inducement to the legislators to take off any difficulty or incapacity already laid upon the papists, but quite contrary. And as the occasion could not move them to it, so their intention through the tenor of the act looks quite another way; and surely it is not reasonable to suppose that they would lay upon them more incapacities of a lower nature, as law-practice, physic, &c. and take off those of an higher nature. Further, the persons, subject-matter, and penalties of this act, are all different from those of 1. *Jac.* 1. c. 4. and could not therefore be a repeal of that. As to the 3. *Car.* 1. c. 2. this very act proves that 1. *Jac.* c. 4. was not repealed by 3. *Jac.* 1. c. 5.; for the preamble of 3. *Car.* 1. c. 2. takes notice of this act 1. *Jac.* 1. c. 4. as an act in force, and that ought to be put in execution, but takes no notice at all of 3. *Jac.* 1. c. 5.; so that supposing it repealed by 3. *Jac.* 1. c. 5. it would stand revived by 3. *Car.* 1. c. 2. As to what follows in 3. *Car.* 1. c. 2. it would be very material, were it our case, which it is not: for the statute 3. *Car.* 1. c. 2. has respect to estates already vested; but, in our case, the person was disabled from taking before the descent, so that the estate never vested in him.

[119] * SERJEANT CHESHYRE, *for the defendant*, argued, that supposing the statute 3. *Jac.* 1. c. 5. was as to this point, yet in force, it did not hinder the estate from vesting. The *purview* and *saving* are not, as was insinuated, separate and divided sentences; but inseparably conjoined and incorporated together. The maxim *Summa est lex quæ pro religione facit*, must be admitted as a true maxim; but from hence it does by no means follow, that we

(*a*) 11. Co. 56. 1. Roll. 88. Foster's Case.

are

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are to make the most rigid and severe interpretation we can, though contrary to our reason and understanding; this were to be guilty ourselves of what we so justly condemn in the *Roman* Catholicks. It has been said, that their interpretation is more obvious to the vulgar; our's, such as none but lawyers could approve. This, put into other words, is a confession that our's is the interpretation of the most learned and competent Judges, their's of the ignorant and unlearned. The death of *Charles* without issue, can occasion no difference in the construction of an act of parliament; for that, surely, must not depend upon contingencies, such as dying with or without issue. I will therefore, for argument sake, suppose that there is a son of *Charles* now living. Then the case before us would be, that of a father guilty of the offence and the son innocent; the question upon this act of parliament, What becomes of the estate-tail? Why, they say, this act of parliament is to enure as a revocation of that part of the settlement, as if the name of such an offender had never been in it; but certainly this goes too far, for it quite excludes his posterity, contrary to the plain intention of the act. An heir can never take but by descent from his ancestor; but this is impossible, on supposition that the estate never vests in the ancestor. * Alien, tenant in tail, remainder to a subject, he in remainder shall never come in, until the estate-tail be spent; though the alien be incapable of taking an estate-tail for his own benefit *(a)*. A devise to *B.* after the death of a monk without issue; nothing passes to *B.* until the death of the monk without issue *(b)*. If it be objected, that the law will never cast an estate upon a person disabled to take (alien, attaint, &c.), it may be answered, that this comes not up to the case in question; because the very same act that provides for the disability excepts the heirs and posterity. A remainder can never take place but upon the *cesser* of an estate-tail; but if the estate never vested in the father, it could not in the son, nor in the remainder; for an estate which never took effect, can never be said to cease. *Shelly's Case (c)* was quoted to prove, that the son may have an estate by descent, though it never vested in the ancestor; but it was well observed that it proves no such thing. This *dilemma*, then, remains plain and strong upon them, that either the estate must vest in the father for the advantage of his posterity; or else the posterity must be excluded, contrary to the plain intention of the act. As to the act of parliament, it has plainly a two-fold view: the first is to discourage popish education abroad; the second is to save the estate for their posterity: it ought, therefore, to have such a construction put upon it, as that both intentions may stand together; and this they will do, if the father be made to lose the profits during his nonconformity. But then the difficulty is, Who shall take the profits in the mean time? And in this point, it must be acknowledged, that the act is silent; and therefore, according to the common rule,

* [120]

(a) 3 Cro 132. Scattergood v. Edge, Salk. 229.

(b) 1. Leon. 195. Fuller v.

(c) 1. Co.

where

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where * an act gives a penalty, but does not say to whom, there the crown shall have it. It is true, that where a penalty is given by way of damage, that there, though not said to whom, the penalty shall follow the loss; and this difference is taken; 2. *Ventris*, 267. *Moore*, 238. This is not an interpretation that lowers the penalty of the act; for what is the land but the profits of the land? And a grant of the profits, does even in law carry the land along with it; and certainly, nowhere could the pernancy of the profits be lodged better than in the crown: Who so zealous and able to put the law in execution? *Tutissima est custodia quæ sibi creditur*. Before the statute of 26. *Hen* 8. c. 13. by which entailed land was forfeited for treason, the land was preserved, in case of treason, to the children, by general, and as *Lord Hobart* 340. terms them, cunning words. And if tenant in tail, before those laws in *Hen*. 8. had, after forfeiture for treason, been vouched in a common recovery, the recovery would have barred the issue. As to the cases brought to prove, that there is no difficulty for estates to devest out of one and vest in another, as in case of an after-born child, &c. it may be answered, that these cases are not to the purpose; because it is the same estate that is devested out of one, and is vested in another; but here we are in the case of a remainder, which is another estate. It is against the rules of law, that *Philip* should be dead as to the remainder-man, but alive in respect to his issue, if he should have any; and that the same estate should cease as to one, and revive as to another (*a*). It was observed, that this act disabled him from purchasing with respect to himself only, but not with respect to his issue; and that he might purchase to lose the profits, but not to retain them; and that if this interpretation might be put upon the word "purchase," it

*[122] must * likewise be put upon the word "inherit," for they are joined both together. It was added, in favour of this interpretation, that a person attainted may take by descent; but then indeed it is not for his own advantage, but that of the crown. So for the alien. The same law as to a villain, for the advantage of his lord. And surely *Charles*, or *Philip*, is not in a worse condition than aliens, villains, and persons attainted. As to what was said to *Lord Delaware's Case*, that had he attempted it, he might possibly have sat in the house of lords, living his father; it seems a strange punishment, that the father should not be allowed to sit in the house of lords himself, but he may send his son thither, to act and vote just as he himself would do. As to the interpretation put upon the clause concerning conformity, that this comes too late after the descent of the estate; it does in a manner subvert the chief design for which the clause was put in, *viz*. an encouragement to conformity. For children are sent over very young; and if, after the descent, no advantage is to be gained by conformity, there will remain but little time wherein this clause can be any inducement to them to conform. As to the objection, that this interpretation

(*a*) Beaumont's Case, 9. Co. 140.

gives

gives them a power of alienating; it may be said, that this power is not properly given, but only remained as a consequence of the estate that was still in them. And even the statute of 11. *Will.* 3. c. 4. does not go about to restrain a papist from alienating.

THE ARGUMENT ON THE DEMISE OF THE DUCHESS OF HAMILTON, against FLEETWOOD.

As to THE SECOND POINT, *viz.* that the statute 1. *Jac.* 1. c. 4. stood repealed by reason of the inconsistency there was with the subsequent statutes; it was said, that all the three statutes had the same end in view, but differed in the means of promoting it. * It was denied, that a repeal by implication is any reflection upon the legislators; nothing is more common than to repeal in one sessions, laws made in another. How many laws are made temporary upon this very consideration, that they are not sure how well they will answer the design of their institution? In a word, it is no reflection, that men are but men. As to what was urged from the occasion of making this act, *viz.* the *Gunpowder Treason*, it was acknowledged that the design of the parliament was rather to lay more hardships upon the papists, and make more effectual laws against them; and accordingly three great defects in the act of 1. *Jac.* 1. c. 4. are all supplied by the 3. *Jac.* 1. c. 5. The first defect is, that 1. *Jac.* 1. c. 4. hinders not but that persons might be sent abroad to be bred papists, provided they were not sent to seminaries and colleges, &c.; but 3. *Jac.* 1. c. 5. provides against this. Secondly, The penalty not being given to the informer, there was no encouragement to prosecute upon the act; but this is altered by 3. *Jac.* 1. c. 5. Thirdly, The act is silent who shall take the profits in the mean time; and though they must therefore go to the king, yet he is, according to the phrase of our Books, *occupatus de arduis negotiis regni*, and will often let such matters escape his notice; but this is settled by 3. *Jac.* 1. c. 5. in the next of kin. According to the interpretation which the plaintiff would put upon the statute 1. *Jac.* 1. c. 4. it may happen, that a *Roman* Catholick, unfortunately happening to have a foreign education, shall be excluded, only to make way for a rigid papist bred at home. The statute 3. *Car.* 1. c. 2. goes further than any of the former; the purview is greater, and so is the penalty. * [123]

As to the objection, that the 3. *Car.* 1. c. 2. takes notice of the statute 1. *Jac.* 1. c. 4. as a law in force and fit to be put in execution; and that supposing it was repealed by the 3. *Jac.* 1. c. 5. it would stand revived by the statute 3. *Car.* 1. c. 2.; it was answered, that it was not repealed by 3. *Jac.* 1. c. 5. in the whole, but in part only; that the act 1. *Jac.* 1. c. 4. * contains several provisions that are not either in 3. *Jac.* 1. c. 5. or in the 3. *Car.* 1. c. 2. as; first, It is very penal upon the officer of the ports who shall suffer them to pass; secondly, It is very penal upon the master of the ship; and thirdly, upon the mariners. And for the sake of the unrepealed clauses, the statute 3. *Car.* 1. c. 2. takes notice of the act, as an act still in force, and what ought to be put in execution. * [124]

Then a great deal of time was taken in proving the act 1. *Jac.* 1. c. 4. to stand repealed by 3. *Jac.* 1. c. 5. from the inconsistencies of the one act with the other.

SHERRY, on the demise of the Duchess of Hamilton, *against* Fleetwood.

After this it was insisted upon, that there had been several *general pardons*, and one particularly in the year 1690, by which the offence being pardoned, the disability was so *ex consequenti*; and this pardon coming out before the death of *Charles*, viz. before *Philip*, now living, could make his claim, must have the same effect, with respect to him, as his conformity would; and for this purpose 3. *Levinz*, 332. was quoted.

It was further urged, that *Charles* by his entry had gained a tortious fee, which was sufficient, until defeated, to maintain the recovery. 3. *Rep.* 59. *Hobart*, 262. If land be given to *an alien* in tail, and the alien suffers a common recovery, the recovery is good; for an alien is a good tenant to the *præcipe*, until office found. The same law for a person attainted. *A monk* is indeed said to be dead in law; but that is a mere contrivance for the advantage of the papal grandeur; for if the monk should be afterwards made a bishop, he is then alive to purchase for the benefit of his church: for, as *Lord Coke* informs us in another place, the rule is to be interpreted for the church, not against it. If now *Charles* may be allowed to purchase for the advantage of his issue, as a monk for that of the church, the case of a monk will be an authority for us; for *Charles* by his entry while incapacitated, committed an act of disseisin, which may be considered * as a new purchase, a word used in the act 1. *Jac.* 1. c. 4. *Goldsborough*, 102. 4. *Leon.* 84. Many are the authorities which prove a monk may be disseisor; but it particularly appears to be so by this, that a *writ of assise* lies against a monk, the judgment in which writ is *quod recuperet seisinam*, which supposes a monk to have a freehold. It was added, that common recoveries are favoured in law, especially when suffered in favour of a purchaser for a valuable consideration, which is the present case, being that of a marriage with ten thousand pounds portion, besides twenty-five years unmolested possession under the common recovery (*a*).

* [125]

(*a*) After these arguments in the court of common pleas, judgment was given for the defendant. See 1. Stra. 320 to 328. On this judgment a writ of error was brought in the court of king's bench, which was argued in Hilary Term, 3. *Geo.* 1. S. C. post. 356. and again in Trinity Term, 4. *Geo.* 1. S. C. post. 406. See also Stra. 346. 352. a third and fourth argument; after which the Court took time to consider, Stra. 365. And in Hilary Term, 6. *Geo.* 1. the Judges gave their opinion *seriatim*; and the Court being equally divided, the judgment, upon the consent of the plaintiff in error, was affirmed, S. C. Stra. 383. A writ of error was brought to the house of lords, where, after hearing argument by Counsel, and the opinions of eleven of the Judges, the judgments of the common pleas and king's bench were affirmed. S. C. 2. Brown's Cases in Parl. 216.

HILARY TERM,

The Eleventh of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir Thomas Powys, *Knt.*
} *Justices.*

Sir Edward Northey, *Knt. Attorney General.*

Sir Robert Raymond, *Knt. Solicitor General.*

Case of University of Cambridge. Case 69.

AN ACTION OF ASSAULT AND BATTERY was brought against one of the members of the University of *Cambridge*, and a general imparlance given from one Term to another.

The chancellor of the University comes and claims conusance of the pleas, by virtue of a charter in *Queen Elizabeth*'s time, whereby *cognitio placitorum*, with exclusive words *non alibi*, *&c.* was given to the court of the vice-chancellor; to proceed *secundum legem et consuetudinem Universitatis*, in all cases where any of the body of that University should be defendants; which charter was confirmed by act of parliament, of which they produced a copy.

And, Whether this claim should be received? was the question.

MR. PAGE, MR. LECHMERE, and MR. WHITAKER, argued thus that it should not. It was said, and admitted to be so by the Court, that such a grant was not good of itself, without the help of

The University of *Cambridge* had a charter granted to them by *Queen Elizabeth*, whereby *cognitio placitorum*, with exclusive words *non alibi*, *&c.* was given to the court of the vice-chancellor, to proceed *secundum legem et consuetudinem* of the University, in all cases where any of the body are defendants; which charter was confirmed by parliament: resolved, that after imparlance it was too late to make that claim.
S. C. 1. Stra. 557. S. C. 2. Ld. Ray. 1334. S. C. Fort. 202.

CASE OF UNIVERSITY OF CAMBRIDGE.

an act of parliament. For though the crown may *grant conusance of pleas to proceed *secundum legem terræ*, it cannot so proceed by other laws; for that would be to make new laws, which the crown, as being but one branch of the legislative power, cannot do. A copy of an act of parliament is no evidence, unless the act had been before allowed of, and so made a record of this court; for otherwise nothing shall be allowed of, as a sufficient evidence of the act, but the exemplification of it under the great seal. And the reason is, because the Court is party, which cannot pray *oyer* as the party may; so that the Court would be in a worse condition than a common person, if they were to receive for evidence a copy offered them. 35. *Hen.* 6. c. 14.

And this was allowed to be so PER CUR.

In the case of *Castle v. Litchfield (a)*, conusance of pleas is said to be of three sorts: FIRST, *Tenere placita*: and this is where the courts are co-ordinate, and have a concurrent jurisdiction; in which case, priority of suit only gives one court the preference to the other. SECONDLY, *Cognitio placitorum*: and this must be limited as to place. THIRDLY, *Cognitio placitorum* with exclusive words "*et non alibi*:" and this may follow the person, and need not be confined to any place. The difference between *cognitio placitorum* without exclusive words, and when with, is not, that the last has an exclusive jurisdiction, the former not; for *cognitio placitorum* does, *ex vi termini*, exclude all other courts, and imports the words "*et non alibi (b)*." But FIRST, The difference is, that the former must be local, confined to some place; the latter
*[127] may follow the person, and be as to place universal. * SECONDLY, In the former, if the lord waive his privilege, there shall be re-summons, and proceedings shall begin where they left off; but in the latter, in case of waiver, or the like, the proceedings in the court excluded by this jurisdiction must begin *de novo*. THIRDLY, The former is for the advantage of the lord only, and therefore the lord only can claim it, and not the party; but where there are exclusive words, the party may claim it as well as the lord. In *Moore*, 249. 276. 9. *Hen.* 7. fo. 10, 11, 12. these differences are fully and clearly laid down. Here it was observed, that the third sort of conusance of pleas, which was with exclusive words "*et* "*non alibi*," that even this did not go so far as to make a nullity of proceedings in courts of law.

Then it was said, that this claim, being made after imparlance, was too late, and that the University had lapsed their time. In *Rastall's Entries (c)*, all claims of *cognitio placitorum* are entered before imparlance. It is too late to claim conusance of pleas after essoin, and by parity of reason after imparlance (*d*). Though an

(*a*) Hard. 505.
(*b*) [illegible] 106. Roll. Abr. 487. Terms of Law, title "Conusance."
(*c*) Rastal, 128
(*d*) The Year-Books 3. *Hen.* 6. fo. 10. 14. *Hen.* 4. fo. 20. 16. *Hen.* 7. fo. 16. 5. *Edw.* 2. fo. 159. 35. *Hen.* 6. fo. 64. and the case of the University of Oxford, Show. 352.

imparlance

imparlance be only given to a day in the same Term, it was doubted whether, even upon such an imparlance, it was not too late to pray it (a)? Plea to the jurisdiction not to be received after an imparlance; and this claim of conusance of the same nature with that plea (b). This difference is laid down (c) with respect to the time of claiming conusance, that where the matter is local, so that it appears upon the face of the record that there is ground for such a claim, it must be made *primo die*, VIZ. when the writ was returned; but where the matter is transitory, it must be made upon the day given to plead. And the reason of all these cases is this, that otherwise there would * be a great delay of justice, unless such claims are made as soon as possible. In the report of the case of *Castle v. Litchfield* (d) it is said, that upon notice (indefinitely) the Court must surcease their plea; from whence it is inferred, that the time of notice is not material: but MR. LECHMERE produced a better report of that case in manuscript, whereby it appeared, that nothing said in that case could warrant such an inference. From this manuscript it was observed, that the *quo minus*, a devise to entitle common persons to sue in the court of exchequer, did not take away such privilege, if demanded before imparlance. It was also observed, that THE LORD CHANCELLOR is included under the word "*Justiciarius.*" If it should be objected, that these authorities are not to the purpose, because it was not the same kind of conusance that was claimed in them as here; it may be answered, that there is nothing in the nature of the conusance now claimed that can give the least shadow of reason why longer time should be allowed for claim here than in those. For, first, though some of them should be only conusance of pleas without exclusive words, yet that can make no difference, since *ante ostensum* that *cognitio placitorum* does, *ex vi termini*, import an exclusive jurisdiction. Secondly, The difference between these two, that the latter, *viz.* that now claimed, is for the advantage of the party as well as the lord, and may therefore be claimed by the party as well as the lord, is rather a reason why less time should be allowed for this claim, than why more. Thirdly, This being a claim of a conusance, where the proceedings are to be, not *secundum legem terræ*, but *Universitatis*, ought rather to be disfavoured, and have less time allowed for that claim than where the proceedings are to be *secundum legem terræ*. This reason * is given (e) for the resumption of many franchises, that they are derogatory to the prerogative, and tend to the delay of justice.

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* [128]

1. Salk. 3

* [129]

IT WAS ARGUED *on the side of the University*, that though there is good reason why there should be a time fixed, as soon as possible, for the party himself to make his claim, yet there is no such reason for the University, who is a stranger to the whole proceeding, to be so bound down. It was said, that this was a personal privilege, and therefore the person might be arrested out of the jurisdiction

(a) Year-Book 6. *Hen.* 7. 9.

(b) The Bishop of Ely's Case, 1. Sid. 103.

(c) Year-Book 21. *Hen.* 4 41.

(d) Hardres, 505.

(e) Year-Book 27. *Hen.* 8. c. 24.

of

CASE OF UNIVERSITY OF CAMBRIDGE.

of the University; so that it was almost not possible, at least not probable, that the University should have notice time enough to make their claim before imparlance. It was urged, that this was a charter of very extensive words, and confirmed by act of parliament; and was therefore to have an advantageous interpretation. After imparlance, a plea of ancient demesne (a plea of the same nature) was received (*a*). *Justice* WINDHAM used to say, it was very hard that a stranger should be bound to claim before imparlance (*b*). And to the cases quoted by the other side this general answer was given, that they were little to the purpose; all of them, almost, relating to conusances that had no exclusive words.

THE COURT were all of opinion, that the claim being made after imparlance was made, was too late; that the act of parliament was out of the case; for that related only to the matter of the conusance, and was only necessary to support a charter, which the crown had no power to grant; for though the crown may grant conusances, yet it cannot grant them with power to proceed by any other law than the common law. But as * to the time and manner of claiming, the act is wholly silent; these therefore are to be governed by the rules of law. Hence it is, that it is necessary for this privilege to be pleaded (*c*); and there is no reason in the world why the rules of law should not govern as well the time of pleading it, as make it necessary for it to be pleaded at all. There is no difference, in the reason of the thing, between conusances with exclusive words and conusances without, as to this point; and therefore all these were esteemed good authorities (*d*).

* [130]

(*a*) Cro. Car. 9. Stiles, 90.
(*b*) 1. Lev. 89.
(*c*) See Paternoster *v.* Graham, Stra. 810. Foster *v.* Hexam, 1. Ld. Ray. 427.
(*d*) See Leasingby *v.* Smith, 2. Wilf. 413. Wills *v.* Trehern, Bar. 346. Rex *v.* Agar, Burr. 2820. Kendrick *v.* Kynaston, Black. Rep. 454.

Case 70.

Mitchell *against* Reynolds.

A bond conditioned that the obligor shall not exercise his trade within a particular parish is good.
S. C. ante, 27.
85.
C. Fort. 296.
S. 1. Peer. Wms. 181.

THE RESOLUTION OF THE COURT was delivered by PARKER, *Chief Justice*, to the following effect:

An action of debt is brought upon a bond thus conditioned: "THAT WHEREAS *A.* had taken the shop of *B.* who was a baker, "for the term of so many years, and had given *B.* so much money "for it, THE CONDITION OF THE OBLIGATION was such, "That if during the term aforesaid *B.* shall not exercise the trade "of a baker within the parish where the shop was, that then the "bond shall be void; otherwise remain in full force, &c."

And, Whether this be a good or a void bond? was the question.

WE ARE ALL OF OPINION, that the bond is good, and that the true distinction is not between *a bond* and *a promise*; that a bond shall be void and promise good; but between contracts, whether by

bond

bond, covenant, or promise, entered into upon a just, fair, and reasonable consideration, and those entered into upon no consideration or a vicious one, whether it be by bond, covenant, or promise, that the former will be good, the latter void. Mitchell against Reynolds.

* Cases of restraint of trade are either involuntary or voluntary. * [131]

Involuntary are of three sorts: First, By grant or charter; Secondly, Custom; Thirdly, Bye-laws.

First, By a new charter granted (a). The grant of the sole use of a trade is void (b), but a grant of a trade newly-invented, and for a time, is good (c); for the public has an advantage in the invention of a useful trade, which after a limited time is to be public; and the inventor's industry is sufficiently encouraged by the sole use of it secured to him by charter for such a time: but a second grant would be void, even in this case; and the statute 21. *Jac.* 1. c. 3. limits the time for which such grant may be made to fourteen years.

Secondly, By custom: and this is either, first, for the advantage of some particular person that has stock enough to serve the place (d); or, secondly, for the advantage of the corporation or community of a certain place (e); or, thirdly, where persons not supposed to use the trade have yet a prerogative, that nobody shall use such a trade within such a compass, without licence from them first obtained; and this is *ratione dominii* (f).

Thirdly, By bye-laws. Bye-laws to exclude foreigners, where there is no custom to justify them, are void (g); but if in affirmance of a custom, they are good (h). Bye-laws to cramp and lay difficulties upon trade are void (i); but bye-laws to regulate trade are good, whether they are for the advantage of the town (k), or of trade (l).

Now I come to voluntary restraints: and here,

First, All contracts for restraint of trade over all *England* are void, whether by bond, covenant, or promise; whether * of that trade a man is brought up to, or any other trade he afterwards falls into (m). * [132]

Secondly, Contracts to restrain trade in a particular place are void, if not done upon a fair, just, and good consideration (n).

(a) 8. Co. 121.
(b) 11. Co. 84.
(c) Godb. 125.
(d) 2. Bulst. 135. 1. Roll. 561.
(e) Dyer, 279. Jones, 162. Carter, 114.
(f) See the case of the Archbishop of York, Reg. 105.
(g) Carter, 68. 114.
(h) 1. Roll. 364.
(i) Moor, 576. 1. Bulst. 11. and statute 20. *Car.* 2. c.
(k) 1. Sid. 284. Raym. 288.
(l) 5. Co. 62. 2. Keb. 309.
(m) Cro. Eliz. 872. Cro. Jac. 596. Allen, 67.
(n) See the Year-Book 2. *Hen.* 5. pl. 5. and the main point to this case, Moor, 115. 242.

Mitchell against Reynolds.

THIRDLY. Where the contract for the restraint of trade in a particular place appears to have been made upon a fair and just consideration, the contract is good, be it by bond, covenant, or promise (*a*). In *Joliffe v. Brode* (*b*), a remarkable case, the plaintiff and defendant were mercers, living near to one another; the defendant desired the plaintiff to buy his old goods, which the plaintiff did at such a price, upon consideration that the defendant would not exercise his trade within such a place. In this case it was FIRST observed, that it was a voluntary restraint; and the rule is, *Volenti non fit injuria*; SECONDLY, that it was made upon a valuable consideration; the use of his trade being compensated to the defendant by the price given him for his old goods; THIRDLY, That the agreement was neither *malum in se*, nor *malum prohibitum*; FOURTHLY, A man may bind himself not to live in such a place, and by consequence not to trade there; and, FIFTHLY, These kinds of bonds are very frequent in *London*. In this case the material difference I first laid down is established; and the judgment in this case, as appears, was affirmed upon error in the exchequer chamber (*c*). The case of *Prugnel v. Grosse* (*d*), is a remarkable case; and the stress was laid upon the consideration; not whether it was by bond, covenant, or promise. The case of *Thompson v. Hervey* (*e*), though but an imperfect report, was of a restraint from buying of a particular person, and the same difference taken (*f*).

* [133] * I shall now make a few useful observations.

FIRST, That a restraint to obtain the sole use of trade "through "all *England*" is void; for it is a monopoly.

SECONDLY, That a restraint from using one's trade in a particular place, if done fairly, and upon a good and lawful consideration, and with no ill intention, is good.

THIRDLY, That this is not in itself unlawful or unreasonable, for then custom could not make it good, all unjust and unreasonable customs being void.

FOURTHLY, That since it is agreed on all hands that an action upon the case would have lain, which concludes *ad damnum*, and there can be no *damnum absque injuriâ*, it follows, that the law reckons the breach of such a contract an unjust and injurious action.

FIFTHLY, That it is not unreasonable to enforce bye-laws with a penalty; since no bye-law which is either unjust or unreasonable can ever be good.

(*a*) Rogers v. Parry, 2. Bulst. 136. The case is there not well stated, but may be found 11. *Jac.* 1. Roll. 323.

(*b*) Cro. Jac. 596. Jones, 13.

(*c*) Cro. Jac. 596.

(*d*) Allen, 67. Palm. 172. March, 17.

(*e*) 1. Show. 2. S. C. Comb. 121.

(*f*) 2. Saund. 155.

SIXTHLY

SIXTHLY, The reſtraint of it muſt be upon good conſideration, and the breach of it muſt apparently tend to the damage of the other; for elſe the reſtraint is void, though for a particular place.

Mitchel against Reynolds.

I ſhall now give my reaſons, why of involuntary and voluntary reſtraints ſome are void, and others good.

FIRST, For involuntary reſtraints. Grants, charters, &c. erecting monopolies, are void for two reaſons; FIRST, Becauſe they are againſt the freedom and birthright of the ſubject: SECONDLY, Becauſe they are contrary to MAGNA CHARTA. But it is otherwiſe where the grant or charter is to enforce a cuſtom; for if the cuſtom be good, the charter enforcing it muſt be ſo too; or where the grant or charter is made for the good regulation and government of trade; for the public good is ever to be preferred to a private loſs.

Next, In giving the reaſons of voluntary reſtraints, I ſhall proceed, FIRST, *negatively*, and ſhew what are not the * true reaſons; * [134] and SECONDLY, *poſitively*, and point out the true ones.

FIRST, That they are againſt MAGNA CHARTA is no good reaſon; becauſe MAGNA CHARTA provides againſt force and power, not voluntary acts of men.

SECONDLY, That they are againſt the liberty of the ſubject is no good reaſon; for what a man parts with is no longer his own. If I ſell my liberty to trade, it is no longer mine, but his to whom I ſell it.

THIRDLY, It is not a good reaſon, that the condition is againſt law in a proper ſenſe; for every thing that is againſt law in a proper ſenſe muſt be either: FIRST, *malum (a)*; or, SECONDLY, omitting or neglecting what is a man's duty *(b)*; or, LASTLY, encouraging the commiſſion of an evil action *(c)*.

I ſay, conditions againſt law in a proper ſenſe muſt fall under one of theſe heads. And this laſt head explains the reaſon of the difference taken 1. *Inſt.* 106. 8. between a feoffment and a bond; that a feoffment to a man upon condition he will kill *B.* ſhall be good, but a bond with ſuch a condition ſhall be void. For in the one caſe, leſt the man ſhould have any temptation to do the act, the law ſecures to him the poſſeſſion of the land without performing the condition; and in the other, frees him from the penalty of the bond; ſo that the law has the ſame end in view in making the feoffment good and the bond void, *viz.* the prevention of the fact. Wherever there can be a way found out to perform the condition without breach of the law, the bond ſhall be eſteemed good *(d)*. All things that may be prohibited by law, may be ſo too by the condition of a bond *(e)*. * The condition of the bond * [135]

(a) Co. Lit. 206. 216. Perkins, 139. Carter, 229. 2. Keb. 140. 153.

(b) Palm. 172. Fitz. 13.

(c) Brook. Abr. "Condition," 34. Year-Book 2 *Hen.* 4. 9. Hob. 12.

(d) Perk. 758. 1. Co. 22. Hob. 12. Norton *v.* Sims, Cro. Eliz. 705.

(e) Year-Book 13. *Hen.* 7. 23, 24.

before

MITCHELL against REYNOLDS.

before us is neither *malum in se* nor *malum prohibitum*; for then neither custom nor covenant could make it good.

I come now to shew *affirmatively*, what are the true reasons why of contracts in restraint of trade some are void and others good.

FIRST, Because it is depriving the party of a means of a livelihood.

SECONDLY, Because of the great abuse such bonds are liable to; as the enabling corporations to exclude foreigners, which they have no right to do; and masters to lay hardships upon their servants, apprentices, &c.

THIRDLY, Because it is a condition of no use to the other party. *Puffendorf* (a) makes all useless agreements, as an agreement not to wash one's hands, &c. void. *Cui bono* is ever of great weight in all agreements (b).

FOURTHLY, There may be several cases where agreements for restraint of trade in particular places may be of advantage to some, and no disadvantage to the rest; and there they are good; as for example, where a town is overstocked with persons of the same trade; or in the case before cited of *Jolliffe v. Brode*, where a man grown old and unable to carry on his trade without blunders, and having a good accustomed shop, *quid damni* in such an agreement, as was there entered into, to either? but an apparent advantage to both.

FIFTHLY, Those contracts in restraint of trade are void, where the performance is attended with an immediate and apparent damage to the one side, only to free the other from the fear of a distant damage, that may or may not happen (c). In the case of *Barrow v. Wood* (d) it is said, that an agreement not to sow one's land is void; but the case in *the Year-Book* (e), upon which this assertion is founded, warrants no such general position (f).

[136] *SIXTHLY, Supposing it did not appear in the condition of the bond whether it were upon a fair and just consideration or not, are these bonds *primâ facie* to be esteemed void? or, Shall they be esteemed good until the party for whose advantage it is shew in evidence the illegality of the consideration upon which they are founded? I answer, FIRST, as to equity, the law might be settled either way, provided it were known. But, SECONDLY, as the law now stands they are *primâ facie* void; and for these reasons: First, On account of the benignity of the common law, and the tender regard it has for the liberty and right of the subject: Secondly, For the apparent mischief to one side, and no visible advantage of the other side to counterbalance it; which mischief, in the first place, is not barely a private one, but has an influence upon the

(a) Puff. de Jure Naturæ, lib. 5. cap. 2. f. 3.
(b) Year-Book 21. *Hen.* 7. fol. 20.
(c) Case of Taylors of Ipswich.
(d) March, 191.
(e) Mich. 7. *Edw.* 3. 64.
(f) Allen, 67.

public,

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public, that being interested in a man's trade. And in the second place, there is not only a visible prejudice of the one side, and no apparent advantage of the other, but a great probability that there is none; since to its being an advantage to a man to leave his trade, so many special circumstances are necessary as are never to be presumed where they do not appear. *Hinc constat*,

FIRST, That all bonds for restraint of trade, and no reason given, are *primâ facie* void.

SECONDLY, Where the condition of the bond assigns a just and fair reason, the bond is good, until that reason can be falsified.

THIRDLY, From hence it appears, why a bond for restraint of trade "all over *England*," be the consideration what it will, is void; because, without doubt, some place or other may be found where the party entering into such a bond may use his trade, without any prejudice to the obligee, unless the obligee intend by this bond to make a monopoly of the trade; which reason is better let alone than given.

FOURTHLY, By this, the difference taken in some of our old Books between bond and covenant or promise may be very well accounted for, *viz*. Because upon a bond * there is no necessity for * [137]
the reason and nature of the contract to appear; whereas in promise or covenant the whole nature and all the circumstances of the contract must appear to the jury, before they can determine the damages they are to give for the breach of the covenant.

FIFTHLY, This not only accounts for the judgments given, but also the expressions used in those cases; as in the Year-Book of *Henry the Fifth* (*a*), the consideration of the bond not appearing, and therefore being to be presumed an oppressive bond, the indignation of the Judge, though not the way of expressing it (swearing), may be excused. Perhaps it was such a case as this: A weaver forced by the necessity of his circumstances to sell to his loss, another takes him, thus chagrined, to the tavern, where, for a trifle, he extorts such a bond from him, and when the cries and tears of his half-starved wife and children call him again to the loom, this bond is put in suit against him. This were a crime I am at a loss to find a name for. If, according to *Puffendorf*, by the laws of nature, useless contracts are void, how much more oppressive ones?

And now I come to consider the case of *Clerk v. Taylors of Exeter* (*b*), wherein it is said, that such a contract by *bond* is void, by promise good.

And here, FIRST, Upon the face of it this appears very harsh doctrine. For a bond may be considered in a twofold respect: First, As a security for not breaking this contract; and can a man be bound too fast not to break his word? Secondly, The

(*a*) 4. Hen. 5. pl.   (*b*) 3. Lev 241.

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penalty may be considered as a compensation for the breach of the agreement, as a price of re-purchasing the liberty restrained by the bond; and this settled by persons of full age, that are both most capable of it, and have likewise the best right to do it. As a man may *cedere suo jure*, so he may do it upon what terms he thinks fit. A man may say, "I will not absolutely exclude myself
[138] from doing such a thing; but I will * bind myself in a bond of such a penalty not to do it, that so, if I think fit to forfeit the penalty, I may be at my liberty (a)." And certainly it would be very strange, that the law of *England*, that delights so much in certainty, should make a bond void, only because the damages are there ascertained by the parties themselves, who are the properest persons to do it, and make a covenant or promise good, only because the damages must there be reduced to certainty by a jury.

SECONDLY, As this is very harsh doctrine, so it was an opinion not at all necessary for the judgment given in that case, which stands unimpeached upon the ground I have all along gone upon in this case; so that it is only the reporter's opinion, founded upon *March*, 77. 191. a very indifferent reporter. And the reason given for the difference, *viz.* that in a bond the whole penalty is forfeited, whereas in a contract it was to be recovered in damages to be assessed by a jury, was a reason that held as well against all bonds in general as this. There can be but two reasons for leaving it to a jury: either that the jury may see whether it is a lawful contract or not; which is proper for the consideration of the Court, not the jury: or else, *quia nescitur quod damnum*; but this is no reason here, because the *damnum* is fixed by the consent of the parties. Let it be further considered, that the party can suffer nothing but by being a knave; and shall a court of justice assist a man to play the knave? Freedom to trade is as much bound by consent as custom: and the case of penalties made for the enforcement of such a custom seems to me a stronger case; for there the party is, as it were, judge in his own case, whereas here the penalty is fixed by consent of both sides. Such an agreement in taking an apprentice is good, and may be considered not as a prejudicial or restraining agreement, but as a favourable and advantageous one, as putting an apprentice in a capacity of getting his living in any part of *England*, but where it would be
[139] to * the prejudice of his master, when without it he can gain it no where.

This case has been compared to that of an infant, whom a contract for necessaries will bind, but not a bond. But this is nothing to tho purpose; for it stands clearly upon the incapacity of the infant to make any contract at all but such as shall be for his advantage; and it can never be for his advantage to enter into a penalty, That this is so is plain from hence, that if an infant and a surety enter into a bond for necessaries for the infant, the bond is good as to the surety, though not the infant: so that it is not the

(a) See Bracton, bk. 3 cap. 2.

nature

nature of the bond, but incapacity of the infant, that makes the bond void.

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This case has also been compared to bonds taken by sheriffs for their fees, which are void. But here, FIRST, The sheriff by the common law was to take no fees at all for doing his office; and therefore as these fees are given by act of parliament, the act must be strictly pursued. But SECONDLY, and principally, Those bonds are void, from the apparent probability that they will make use of them to support their oppression. There is but one objection that seems to have any colour in it, *viz.* that false recitals of considerations will make those bonds good that ought to be void. But first, This is to be feared no more than false testimony: secondly, This special matter may be given in evidence.

To conclude: The bond in the case before us is good, and entered into upon a just and fair consideration; for the restraint is exactly proportioned to the consideration, *viz.* the term of seven years only; and the interest of the public is not at all concerned (*a*).

(*a*) See Davis *v.* Mason, 5. Term Rep. 118.

*[140]

* Skinner *against* Newton.

Case 71.

Judgment in trespass reversed *nisi* for want of using the word "*clausum*" instead of "*pecias*."

S. C. post. 168.

TRESPASS IN AN INFERIOR COURT. The plaintiff declared, that the defendant *vi et armis tres pecias terræ fregit, &c. ipsius* the plaintiff, containing so many acres, in such a place. The defendant justified by prescription for a way; and on issue joined verdict was given for the plaintiff, and judgment accordingly.

UPON ERROR BROUGHT *it was insisted*, that the declaration should have been worded *clausum terræ* instead of *pecias*. For trespass is a formed action, and there is no sort of trespass for which a form is not set down; and in those actions for which a form of words is provided by the law, it is not in the power of the plaintiff to use what words his fancy shall lead him to; but he must use the words which the law has so appropriated that they can be expressed by nothing else. Every man's ground is in the eye of the law fenced. Trespass will lie for *the vesture* of land; but even there the declaration must be not *vesturam terræ*, but *clausum terræ* (*a*). In trespass for breaking into a church-yard, it was held, that it must be *clausum terræ* (*b*). Where a man has only herbage of land, he must declare *quare clausum fregit* (*c*). In *Web's Case (d)*, the difference is taken between those actions that are formed, *viz.* have set forms of words prescribed for them, and those that have not. Indeed, in *Hobart*, 51. a variance from *the Register*, in a *formedon*, where the variance was not material, was not regarded. In *Hobart*, 84. there is an

(*a*) Co. Lit. 4. b.
(*b*) Year-Book 8. *Hen.* 6. pl 9.
(*c*) Dyer, 285.
(*d*) 8. Co. 48.

instance

SKINNER *against* NEWTON.

instance of a material variance from *the Register*, and held good; but then there was this particular reason, that all the course of precedents were on the side of the variation, which must all otherwise have been overthrown. In the case of *Blake v. Clattel (a)*, [141] the declaration was, *quare clausum * fregit, et diversa onera* of gravel, &c. *per quod viam suam amisit*; and the judgment was arrested. The word "*clausum*" imports possession, without which trespass is not maintainable (*b*); for tenant at will or for years, reversion to another, he in reversion cannot maintain an action of trespass during the life of tenant for years: but *pecia terræ* does not import possession; for *terra rev'riens* is *terra* still.

IT WAS ARGUED *on the other side*, that though "*clausum*" was the word in *the Register*, yet it was but matter of form, and therefore pleadable indeed in abatement, but not assignable for error, after a verdict and judgment. In the case of *Palmer v. Humfrey (c)*, the words *pecias terræ* were held good in an ejectment. It is true, that judgment was reversed; but the reason was, because there was not certainty enough to direct the sheriff what land to deliver to the party for whom the judgment should pass; whereas here was as much certainty as could be desired; for it was not *tres pecias terræ* barely, but the declaration goes on and says, *ipsius* the plaintiff (which proves him to have been in possession, and so obviates that objection), containing so many acres in such a place.

PARKER, *Chief Justice*, and POWELL, *Justice*. There is no want of certainty in this declaration; and after a verdict and judgment, it is hard for meer form to reverse, &c. Indeed, in real actions, that are formed actions, men are tied up strictly to the form prescribed in THE REGISTER: *Sed aliter* in personal actions.

EYRE, *Justice*, was of the same opinion, and gave this additional reason, that error does not remove the writ nor plaint, but the proceedings only; and the plaintiff in error could not be let in to make this objection but from the one or the other. But supposing the plaint was removed, it could not appear in the plaint; for [142] that is * only *in placito transgressionis super casum*, without going further.

POWELL, *Justice*, thought this reason of no weight, because he was of opinion, that a writ of error in a judgment given in a superior court does not indeed remove the record or plaint, but proceedings only; because here *diminution* may be alledged: but he was of opinion, that writs of error of judgments in an inferior court removed all, because there was no alledging of diminution.

Adjournatur (d).

(*a*) 2. Vent. 73.
(*b*) Year-Book 22. *Edw.* 4. 12. a.
(*c*) Moor, 422.
(*d*) It is said to have been held in this case, that the variance from the Register might have been taken advantage of in abatement, but that the defendant having waived that opportunity could not take advantage of it on a writ of error, 1. Stra. 157.—But see S. C. post. 168. where it is said, that the judgment was reversed.

Hacket

Hacket *against* Glover.

Case 72.

If a person sell goods, and warrant them to the vendee against *all persons*, it may be assigned as a breach of the covenant, that the vendor, at the time of the sale, had neither the *possession* nor the *property* of them.

WRIT OF ERROR, out of the court of common pleas, upon an action of covenant; wherein the plaintiff declares, that the defendant sold him goods for so much money, and covenanted to defend and warrant the goods to the plaintiff *contra omnes personas*; and assigns for breach of the covenant, that at the time of the sale the defendant had neither *the possession* nor *the property* of the goods. To this the defendant demurred, and judgment was given for the plaintiff.

A writ of error was brought.

SIR PETER KING insisted, that this was no breach of the covenant; for the intention and design of the covenant was only to secure the possession; and therefore until an eviction the covenant was not broken. *Lord Coke* (a) says, that an eviction is of the very essence of a warranty; and though *warrantia chartæ* may be brought before eviction, it is only a charge upon the land (b). Suppose a man having only an equitable interest in goods sell those goods, and covenant that he is the owner of those goods, and will warrant and defend, &c. shall the vendee, in this case, bring an action of covenant before eviction, and support it only by * saying, that the property, *viz.* the legal title, was in another at the time of the sale (c). * [143]

MR. LUTWYCHE, *on the other side*, argued, that since it was confessed by the demurrer that he who sold them had neither the possession nor the property, the buyer could not take possession of them without exposing himself to an action of trover. The word "*dimisi*" in a lease imports a covenant in law; and in such an action it had been enough to assign for breach, that the lessor had no title at the time of the lease, without shewing an eviction (d).

PARKER, *Chief Justice*. The plaintiff cannot use the goods without being liable to an action, which is a damage. If the case had been, that the defendant had had the equitable right, but another the legal one, it had been proper for you to have laid it before the Court by pleading it.

EYRE, *Justice*. A warranty, in the nature of it, imports as well warranty of the property as possession (e). The case upon the word "*dimisi*" is a strong case; for that is a covenant in law; and if not necessary there to set forth eviction, *à fortiori* not here.

Judgment was affirmed (f).

(a) Co. Lit. 365. a.

(b) Fitz. N. B. 134.

(c) The cases in Moor, 175. Hob. 34. 51. Dyer, 328. 1. Roll. Rep. 519. and 2. Saund. 175. were quoted; but most of them only prove, that a covenant for enjoyment against all interruption extends only to legal interruptions. *Quod concessum per Curiam sed nihil ad rem.* —NOTE *to the former edition.*

(d) 4. Co. 80. Cro. Jac. 474. 3. Mod. 261. 1. Sid. 178.

(e) See Warren *v.* Tallard, 1. Roll. 90.

(f) See Severn *v.* Clarke, 1. Leon. 122. Northcote *v.* Underhill, Salk. 199.

Sheppherd

Case 73. * Sheppherd *against* Maidstone.

On a covenant that *A.* shall serve *B.* as a factor, and faithfully account for the goods he should receive, or the net produce of them; a breach that he received so many rupees, and fraudulently converted them to his own use, is not well assigned.

1. Roll. Abr. 224.
1. Bac. Abr. 8vo. 39.
2. Stra. 227.
2. Burr. 773.

DEBT UPON BOND. Upon *oyer* of the bond it appeared, that the condition was, FIRST, that the defendant should perform all covenants comprised in such a deed of indenture. SECONDLY, That he would, upon request, come to an account with the *East-India Company* for whatever of their goods should come to his hands, or the net produce of them. THIRDLY, That he would pay them whatever, upon such an account taken, he should be found in arrear to them.

In the deed of indenture referred to it was covenanted, that the defendant should, within such a time, go for *Fort St. George*, and serve the Company faithfully there, as *a factor*, for five years.

The breach assigned was, that so many *rupees* belonging to *the Company* came to his hands, which *illicitè et fraudulenter imbezilavit, et in proprium usum, &c. contra tenorem indenturæ, &c.*

THE QUESTION upon *demurrer* was, Whether the breach assigned was a breach of the condition of the bond?

IT WAS RESOLVED BY THE COURT, that it was not; for the defendant was not barely entrusted with the custody of the Company's goods, but was their *factor*; and, as such, had a power to invest their money and goods in whatever he thought most for the advantage of the Company, and was not to account for the goods themselves, but for the net produce of them: so that he might convert to his own use the stock that was the Company's, provided he answered it to them out of his own. Indeed, in case of *an apprentice* the case is different (*a*); for he has only the custody of his master's goods and * cash, and therefore the breach here assigned would have been a forfeiture of his indentures.

* [145]

PENGELLY, *Serjeant*, being retained to speak to it,

Adjournatur (*b*).

(*a*) See Thorbycroft *v.* Barnes, post. 150.

(*b*) See the case of the African Company *v.* Mason, post. 227. Gilb. Rep. 238.

Case 74. Parker *against* Langly.

A declaration in an action on the case for a malicious prosecution must shew what became of the malicious prosecution.

2. [illegible] post. 209.
[illegible] Gilb. 163.

THIS was an action upon the case for a *malicious prosecution*, wherein the plaintiff declared, that the defendant arrested him in the sum of one hundred pounds, on purpose to hold him to special bail, where not one penny was due.

The defendant demurred specially, and shewed for cause of demurrer, that the plaintiff had not, in his declaration, shewn what became of this malicious prosecution.

THEY THAT ARGUED *for the defendant* owned, that after a verdict judgment could not have been arrested for this defect in the

the declaration, because it could not be intended that the plaintiff could have had a verdict, unless it had appeared that the prosecution was malicious (a), but upon demurrer, and that a special one, it was insisted upon as a good exception; for no action will lie for a malicious indictment, without shewing what became of the indictment (b). PARKER against LANGLEY.

* IT WAS ARGUED *for the plaintiff*, that this action is founded upon malice, and brought for holding to excessive bail, which was collateral to the prosecution, and therefore not to wait the event of that, of which, if they did, the statute of Limitations might possibly bar them (c). * [146]

It was urged, that there is a difference between an action upon the case for a malicious prosecution and an action of conspiracy; that in the latter, the plaintiff must indeed shew the former action to be determined; but then it appears from *the Register* (d), that this does not proceed from the nature of the action, but the frame of the writ; and this held to be the reason (e).

THE COURT inclined in favour of defendant.

Sed adjournatur (f).

(a) Skinner v. Gunter, Saund 228.

(b) Cases quoted against do were, 27 Rich 39 b Sayk 13 Hobart, 205 Keilway, 99 b Godbolt, 76 1 Saunders, 228, 229. 1 Jones, 312. Siderfin, 124 Yelverton, 117 Cro Car 291. The reason of all which cases is founded in this, that otherwise there might be a clashing of jurisdictions, and contrary verdicts, as here it is possible, that the defendant may be found guilty of a malicious prosecution; and it may afterwards [illegible], in a proper place, that the [illegible] was not malicious — [illegible]

(c) [illegible] 3 Lev 210

(d) Reg 134

(e) 1 [illegible] 12 1. Jones, 93. Poulter's Case, 9 Co Cro Jac 130

(f) [illegible] page 210 where PARKER, Chief Justice, delivered the opinion of the Court in favour of the defendant.

The Queen *against* The Corporation of Durham. Case 75.

THIS was a *mandamus* to restore H. to the office of town-clerk Two exceptions were taken to the return. On a *mandamus* to restore a town-clerk, a return that he was *annuatim eligibilis* is not bad

FIRST, That they said, that such a year of *Queen Elizabeth*, and long before, they were a corporation, and so did not intitle themselves by prescription, which is ever time out of mind (a).

THE COURT were of opinion, that a corporation must either be by charter or prescription, which is ever time out of mind; and therefore the authorities were allowed for law: but yet the exception was disallowed, because it was only failing in a matter of surplusage. 1. Sid 33.

SECONDLY, It was excepted, that it was not returned, that the town-clerk was actually chosen annually, but only that he was *annuatim*

(a) See the case of Sutton Hospital, 10 Co 1. Cro. Eliz 168. The Year-Book 12 Eliz 4 fo 8 Bagg's Case, 11. Co. 93 Rast Ent 3 and Dyer 7.

nuatim

The Queen against the Corporation of Durham.

nuatim eligibilis; whereas time and usage are necessary to prescription (*a*). * Besides, the office of town-clerk is, in the nature of it, in the eye of the law, an office for life; and will be so intended, until the contrary appear (*b*).

The office of town-clerk is *prima facie* an office for life.

The Court were of opinion, that the other exception is good; for the office of town-clerk is an office for life, unless restrained by charter or prescription, which ought to be shewn upon the return; and that this was not done. Besides, though he be *annuatim eligibilis*, he may continue town-clerk, and will do so, until they choose another; but this does not appear to be done; and therefore the exception is good for both these reasons. If the return had been, "*eligibilis pro uno anno tantùm*," his office would have expired at the end of the year, whether they had chosen another or not; but it is otherwise as this return is.

(*a*) See Co. Lit 113. 1 Lev 262. 3 Cro 170. (*b*) 1 Vent 82.

Case 76.

Merril *against* Josselyn.

In debt on bond payable 25th *March*, if the defendant plead *solvit ante diem*, and the plaintiff take *issue* instead of demurring, the plaintiff cannot have judgment.

Writ of error out of the court of common pleas. The action was debt upon a bond conditioned for payment of money upon the twenty-fifth of *March*. The defendant pleaded payment upon the twentieth of *March*. The plaintiff replied, that he did not pay it upon the twentieth of *March*. Upon this issue was joined; a verdict given for the plaintiff, judgment entered accordingly, and a writ of error brought.

If the verdict had been found for the defendant, and judgment given accordingly, all had been right; for * payment upon the twentieth is payment upon the twenty-first, and so on; but now the verdict is found for the plaintiff, the issue is immaterial; for non-payment upon the twentieth can be no evidence of non-payment upon the twenty-fifth; for it might be paid in the mean time (*a*).

* [148]

S. C. cited 8. Mod. 346.

Parker, *Chief Justice*. It is hard that the defendant should take advantage of his own immaterial pleading; but we cannot help it. The case of *Hill v. Manly* (*b*), in the court of common pleas, is a case in point.

The judgment was reversed (*c*).

(*a*) See Cro Jac 434. Cro Eliz 828 and the case of Mason *v.* Price, Hilary Term, 9 *Anne*

(*b*)

(*c*) See the statute 4 & 5. *Anne*, c 16. f 12. Bull N. P. 174. 2 Stra 994. 2. Burr. 944. 1. Bl Rep. 210.

Case 77.

Jones *against* Gwynn.

In an action for maliciously pre... ...it must ...to have ...en malicious and without probable cause.

This was an action upon the case for falsely and maliciously indicting a man for using the trade of *a badger*, without a licence to do it.

S. C. ...ost 214.—S. C. 1. Salk. 15. S. C. Gilb. 185. ...ria. 977. Bull. N. P. 14. 4 Burr. 1974. 1 Term Rep 544.

One

One exception to the declaration was, that the indictment was said to be *falsò et malitiosè*, and not *absque probabili causâ*.

BUT IT WAS RESOLVED, that in the case of an indictment, "*falsò et malitiosè*," without "*absque probabili causâ*," is enough: but had it been an action for a malicious prosecution, those words must have been in (*a*).

But ANOTHER EXCEPTION was taken by THE COURT, that this was an action brought on an indictment for using, &c. and not being licensed, and yet the plaintiff does not shew that he was licensed. *[149]

THEN IT WAS DOUBTED, Whether this were a matter indictable? and then the question would be, Whether an action would lie for falsely and maliciously indicting a man for a matter not indictable, nor yet containing scandal?

An action for a malicious prosecution will lie, although the indictment is bad; for it equally serves the purpose of malice as if it had been good.

THE COURT inclined to the opinion, that it would not, and that the law stood thus, *viz.* that a false and malicious indictment, for a matter not indictable, yet containing scandal, is actionable; but that if it be neither indictable nor scandalous, it is not actionable (*b*); and that if it were for a matter indictable, though it did not import scandal, it is actionable.

To this opinion of the Court it was objected by the Counsel, that in the reason of the thing they could not see, why its being for a matter indictable or not indictable, should occasion such a difference, since a person, by being falsely and maliciously indicted for a matter not indictable, is put to the same expence and trouble as if it were for a matter indictable; and the maliciousness of the prosecution is rather more.

THE COURT allowed this way of reasoning to have weight in it (*c*).

(*a*) Cro. Jac. 193. 490. 2 Mod 51 Jones, 93 —But see Fanel *v.* Nunn, Bull. N P. 14 Fisher *v.* Bristow, Dougl. 205 Lewis *v.* Farrel, 1 Stra 114 Morgan *v.* Hughes, 2 Term Rep 225.

(*b*) Raym 35 2 Sid. 162. and the case of Savil *v.* Robarts, Salk. 13.

(*c*) The Court took time to consider of this case; and in Hilary Term, in the twelfth year of *Queen Anne*, PARKER, *Chief Justice*, delivered the opinion of the Judges, and gave judgment for the plaintiff See S C post 214.—See also the cases of Chambers *v.* Robinson, 1. Stra. 691. Payne *v.* Porter, Cro. Jac 490. Wicks *v.* Fentham, 4. Term Rep. 248

Thornicroft *against* Barns. Case 78.

WRIT OF ERROR brought upon a judgment given in the court of common pleas. The action was debt upon a bond of one thousand pounds penalty, conditioned, that if such a one, being an *apprentice*, should purloin or embezzle any thing to his master's damage, that then he should make it good.

In debt on bond, conditioned, that if the *apprentice* of the *obligee* should *purloin or embezzle* any thing to his master's damage, the *obligor* will pay it, a breach that he *embezzled and purloined* 200*l.* is well assigned.

THORNICROFT *against* BARNS.

The breach assigned was, that he did embezzle and purloin two hundred pounds.

Upon this issue was joined; a verdict given for the plaintiff; and judgment accordingly.

* [150] * Now, upon error brought, IT WAS INSISTED, that the breach was not well assigned; for the condition of the bond tying it up to such purloining as should be to the damage of the master, the plaintiff in the original action should have averred, that this was a purloining to the damage of the master.

But THE WHOLE COURT thought the judgment of the court of common pleas was well given; for the words "purloining" and "embezzling" are always taken in a bad sense, and *ex vi termini* import damage to the master; and what appears plainly needs not be averred, according to that maxim of law, *Quod constat clarè non debet verificari*.

The judgment was affirmed *nisi* (*a*).

(*a*) See Bache *v.* Proctor, Dougl 382. Jones *v* Williams, Dougl 213.

Case 79.

The Queen *against* The Inhabitants of Hornsey.

Public way.

PARKER, *Chief Justice*. If a vill be erected, and a way laid out to it, if there be no other way but that to the vill, it is not material *quo animo* it was laid out, it shall be deemed *a public way*.

Evidence.

SECONDLY, No one living in a hundred shall be allowed to give evidence for any matter in favour of that hundred, though so poor as upon that account to be excused from the payment of taxes, because though poor at present he may become rich.

EASTER

EASTER TERM,

The Twelfth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt.* *Chief Justice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir Thomas Powys, *Knt.*

Sir Edward Northey, *Knt.* *Attorney General.*
Sir Robert Raymond, *Knt.* *Solicitor General.*

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* The Case of the Corporation of Bewdley. Case 89.

THOSE that produce a witness ought to examine him *in chief* only: but they, against whom he is brought, may examine him upon a *voir dire*, if they please, whether he is concerned in interest.

A witness can only be examined on *voir dire* by the opposite side.

Salk. 594. 11 Mod. 100, 115.

The matter in issue was, Which was the charter by which the corporation of the town of *Bewdley* was to act, whether by the ancient one, or one of later date?

A witness may be examined to explain his answer in chancery, touching his interest in the cause.

A witness was produced to establish the ancient charter.

His evidence was excepted against, as being a mortgagee under the old corporation.

This was proved by an answer of his to a bill in chancery.

But it was insisted that this answer was so uncertainly penned, as that it might be true, and yet his mortgage of such a nature as not to prevent his evidence, and therefore that he might be called to explain the ambiguity of his answer.

THE CASE OF THE CORPORATION OF BEWDLEY.

THE COURT was of opinion that he might, since his answer depended upon his veracity, as much as the evidence he could then give; and if the one be to be credited, why not the other?

* [152] * But afterwards his evidence was rejected upon another consideration, viz. that in his answer he lays the whole stress of his defence upon the matter then in issue, viz. the subsisting of the present corporation.

Case 81.

The Queen *against* Ridpath.

If a person, being apprehended for *a libel* and brought up by *habeas corpus*, enters into recognizance to appear in the court of king's bench on the first day of Term, *ad respondendum*, &c. and an information, *ex officio*, is exhibited against him on that day, and a *nolle prosequi* is entered thereon, and on the last day of the Term a new information filed; the recognizance is not discharged by his *appearance* to the first information, or by the *nolle prosequi*, but obliges him to appear to the second information.

A RECOGNIZANCE was entered into by *Ridpath*, with securities, whereby he was bound to appear the first day of the Term *ad respondendum*, &c. in the mean time to his good behaviour, and not to depart without the licence of the Court.

An information was preferred against him by THE ATTORNEY-GENERAL; to which information, by reason of some defect in the pleading, THE ATTORNEY-GENERAL thought fit to enter a *nolle prosequi*, and then THE ATTORNEY-GENERAL exhibited another.

IT WAS INSISTED in favour of *Ridpath* and his securities,

FIRST, That the words "*ad respondendum*" must be extended to those crimes only, the suspicion of which was the cause of his commitment and entering into the recognizance, and not to the crimes he should afterwards commit, or be charged with; for then it would be utterly impossible for a man to get anybody to be bound in a recognizance with him; an opinion of the innocence of the person, as to the crime charged, being probably the only motive that can be sufficient to induce men to become bound for others.

SECONDLY, That "*ad respondendum*" refers to the first day of the Term, when he was bound to appear.

THIRDLY, That the entering of a *nolle prosequi* was a bar to the offence contained in the information; at least that it was a discharge from any further prosecution for it; and that it was all one, whether he was discharged from the recognizance by rule of court made for that purpose, * or by a judgment, that by a necessary consequence amounted to a discharge.

S. C. Fort. 358

* [153] But THE COURT were of opinion, that the recognizance extended to all crimes whatever which he should be charged with; and that if it had relation to any particular crime only, it must be mentioned in the recognizance; but that is only "*ad respondendum*" generally. That there was no such inconvenience as was pretended; the bail in this case being bound in a sum certain, and not to stand in the place of the principal, as in civil cases: that the person's not appearing according to his recognizance, his absence (be the cause or reason of it what it will) was the cause of

the

the forfeiture of the recognizance. That anciently in special bail in civil actions, where the bail is to stand in the place of the principal, bail to one action was to stand bail to all actions that he should be charged with when in court. That this was hard in case of special bail, and is therefore now altered, though altered only by rule of court; and that as to common bail the law is still the same. That the *nolle prosequi* was neither a bar nor discharge.

THE QUEEN *against* RIDPATH.

Salk. 21.

*[154]

Turner *against* Goodwin.

Case 82.

THIS was an action of debt upon a bond for three thousand pounds, conditioned for the payment of fifteen hundred pounds. The condition of the bond recited, that WHEREAS *Dibble* was indebted to *Turner* in a bond of three thousand pounds, conditioned for the payment of fifteen hundred pounds, and had recovered judgment for this money; *Goodwin*, upon consideration that the plaintiff would forbear suing out execution upon *Dibble*, promised to pay the money to *Turner* upon request, * he assigning over to him the judgment he had against *Dibble*.—The defendant pleaded in bar, that the plaintiff had not assigned the judgment: The plaintiff replied that he was ready to assign. The defendant demurred, and the plaintiff joined in demurrer.

To debt on bond conditioned to pay so much money, for which the obligee had recovered judgment against *A* upon consideration that the obligee would forbear to sue out execution against *A*. and assign over the judgment to the obligor, if the defendant plead that the obligee had not assigned, the plaintiff may reply that he was ready to assign.

S. C. post. 189. 222.

S. C. Gilb. 40.

S. C. Fort. 145.

IT WAS ARGUED *for the defendant*, that the words "assigning "over the judgment," are in the nature of a precedent condition; for otherwise the defendant would be without any remedy at law for the assignment of his judgment, the obligee only being able to sue upon this bond; but that, on the other hand, no inconvenience could arise to the plaintiff, in interpreting this a precedent condition, because he can put the bond in suit for his money. But supposing the words may, with an equal probability, admit of either interpretation, considered simply in their own nature, yet being the words of the condition of a bond, which is always in ease and favour of the obligor, they must, upon that account, be interpreted a precedent condition. In an action on a covenant to pay so much money, the plaintiff making to the defendant such an estate in land, the declaration was *licèt sæpius requisitus*, &c. he had not paid the money; and the defendant pleaded, that the plaintiff had not made such an estate; and upon demurrer, judgment was given for the defendant; this being resolved to be a precedent condition (*a*).

THE COURT were divided in their opinion.

PARKER, *Chief Justice*, and POWYS, *Justice*, for the plaintiff, were of opinion, that the single question was, Who was to do the first act? and that the * obligor was to do it; for though the obligor be not bound to part with the money, unless the judgment be at the same instant of time assigned to him, yet he is bound to seek

*[155]

(*a*) 1. Lutw 490. 596. 1. Vent. 147

out

TURNER against GOODWIN.

out the obligee, bring the money, and tell him, "Sir, here is your "money, if you will assign the judgment."

EYRE, *Justice*, for the defendant, was of opinion, that the words "*assigning the judgment*" amounted to a precedent condition. First, Because the form of speaking, "yielding, paying, &c." did always import so, unless the nature of the thing spoke the contrary. And, secondly, Because if the judgment was assigned first, the bond might be put in suit for the money; but if the bond was paid first, there lay no remedy at law for the judgment (*a*).

(*a*) This case came on to be argued a second time, and the Court *advisare vult*, S. C Gilb 40. 45 S. C. post. 190, and judgment was afterwards given for the plaintiff, S. C post. 222. by the unanimous opinion of the Court, S. C. Fort 151

Case 83.

The Queen *against* Bradley.

In an information for selling bread short of weight, it is not sufficient to alledge that so many loaves, wanting so much weight, were bought at the shop of the defendant, a common baker.

THIS was a conviction upon the statute 8. *Ann*. c. 18. f. 3. about the assize of bread.

There were two questions in the case.

THE FIRST was, Whether the crime was certainly enough charged in the indictment upon the defendant?

The crime was thus charged, that the bread wanting so much weight of, &c. was bought in the shop of *Bradley*, a common baker.

2. Salk. 578 Ld. Ray. 581. Stra. 497.

And THE COURT were of opinion, that the crime was not certainly enough charged; for the whole charge may be true, and yet the defendant innocent (*a*); for it is possible that it might be the bread of another person, sold in the defendant's shop; that therefore he ought to * have been charged directly with the sale of so much bread. It is true indeed, that when a servant sells it in his master's shop, it is good evidence of its being the master's bread; but it is still but evidence; and it is a constant rule, that that which is but evidence cannot be laid in an indictment.

*[156]

THE SECOND POINT was, Whether the same person can be both informer and witness?

The same person cannot be informer and witness.

THE COURT seemed to be of opinion, that the same person could not be both informer and witness. For as to the objection, that this would render convictions impossible, unless persons were so fortunate as to have witnesses with them, there was nothing in it; for an informer is only nominal, and anybody's name may be made use of (*b*).

(*a*) Dougl 153.
(*b*) The informer cannot be a witness where he is entitled to any part of the penalty. See Rex *v*. Stone, 2 Ld. Ray. 1545.

Manners

Manners *against* Pern. Case 84.

THIS was the cause in which the university of *Cambridge* had, the last Term (*a*), claimed conusance of pleas.

If the university claim cognizance, in an action of assault and battery, and the claim is disallowed on filing after an imparlance, the plaintiff is not entitled to the costs thereby occasioned.

And now the plaintiff moved the Court, that the defendant might pay all the costs for all the motions about that conusance. It was said, that when a defendant makes default at *nisi prius*, he is from that moment out of court, and his motion in arrest of judgment is but as *amicus curiæ*; and yet the plaintiff has always costs.

But THE COURT rejected the motion; for they knew no precedent, nor saw any reason, that because a third person claimed conusance of pleas and is refused, that therefore the defendant should pay the plaintiff costs. Besides, in this case the defendant, by *imparling*, had, as far as lay in him, shewn himself desirous of having the cause tried in this court. Add to all this, that the motion was by no means without foundation; for the University only came a moment too late.

(*a*) Ante, 125.

* The Queen *against* The Inhabitants of Gfuelthorp. Case 85.

THIS was an action upon the statute of *Westminster the Second*, *cap.* 46. which enacts, "that if any, upon just approvement, "do make a hedge and ditch for that purpose, and it is thrown "down afterwards by some that cannot be discovered, by verdict "of the assize or jury, and the towns adjoining will not indict "such as are guilty of the fact; in such case the said towns shall "be distrained to make again such hedge or ditch at their own "costs, and shall also yield damages."

An action cannot be brought on the statute of *Westminster the Second*, until a reasonable time has been given to the inhabitants to indict the offenders.

IT WAS URGED *by the defendant*, that the present proceedings upon this statute were much too quick, it being in all not above three weeks since the crime was committed. The statute gives this action conditionally, *viz.* "if the inhabitants do not indict "the persons guilty of the offence;" and therefore some time must be allowed for notifying the offence, and for inquiring who the offenders are. *Lord Coke* (*a*) allows the inhabitants a year and a day's time for indicting the offenders. The same objection is taken in the case of *Proctor* v. *Mallory* (*b*). And all the precedents are, at least, a year's time subsequent to the offence.

THE COURT were of opinion, that the time was too short; and that the statute supposes a reasonable time ought to be allowed for indicting. If a robbery be committed in the day-time, the hundred is not chargeable until forty days after the offence, and certainly

(*a*) 2. Inst. 406. (*b*) 1. Roll. Rep 365.

The Queen against the Inhabitants of Gravelthorp.

tainly less time must not be allowed here, where the offence is committed in the night-time.

An objection was taken in this case to the defendant's plea; for this statute not extending to every * lord, but to such lord only as had right to approve, the defendants, to shew the lord had no

* [158] right to approve, pleaded a prescription to common thus, "that "divers freeholders had a right to common," without confining their prescription to any certain particular tenements.

It was admitted, that by way of *custom*, this general way of pleading had been good, but not by way of *prescription*.

And to this opinion the Court inclined.

Adjournatur.

Case 86.

Sale *against* Kitchingham.

Where covenants relate to land, they run with it, attend upon the reversion, and the heir may bring the action.

Action of covenant, and several breaches assigned; but that covenant upon which most stress was laid, was, that the lessee should lime and dung the land *durante termino*, which was six years.

This action was brought by the plaintiff as heir at law to the lessor, and the breach of the covenant was thus assigned, "that "after the descent of the land, he did not, *durante termino*, lime "and dung the land."

It was objected *by the defendant*, that covenant is a personal action, and that therefore the executors were the proper persons to have brought this action; though they indeed, upon their recovering, shall be trustees for the heir at law.

But the Court were of opinion, that this was a covenant relating to the land, and for the advantage of the reversion; that it would have gone to an assignee without his being named in the covenant, which proves it to be a covenant that runs with the land, and attends upon the reversion; and by consequence a covenant to which the heir at law will be intitled, as he is to the reversion.

Breach not well assigned.

It was also objected *by the defendant*, that the breach was not well assigned; because the not dunging it and liming it since

* [159] the descent, is no breach of the covenant, * if it was limed and dunged so sufficiently before that it did not need it.

And of this opinion was the Court.

Adjournatur.

The

The Queen *against* The Inhabitants of Westham in Essex.

Case [illegible].

THE COURT was moved to quash an order made by the commissioners of sewers, charging the inhabitants of *Westham* in *Essex*, for erecting of a *tumbling bay* (to prevent any inconvenience occasioned by *Conden lock*, which in the very order is said to have been erected for a private benefit), and of *a lock*, to prevent the damage the *tumbling bay* would occasion to the navigation.

Commissioners of sewers cannot make an assessment for the erection of a *tumbling bay* and *lock* on a navigable river.

THE COURT was of opinion, that the order could not be maintained, because it was out of the power of commissioners of sewers to charge inhabitants for finding an expedient, how a thing erected for a private benefit may be continued, and yet be no nusance; their business should have been to have abated the nusance. Commissioners of sewers have no power to make a river navigable; nor even to improve the navigation of a river beyond what it was before. Preserve it they may in the state it was, by removing obstructions, and other natural ways, but they cannot even help the navigation by erecting locks, or any such artificial methods

TRINITY

TRINITY TERM,

The Twelfth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*
Sir Lyttleton Powys, *Knt.* }
Sir Robert Eyre, *Knt.* } *Justices.*
Sir Thomas Powys, *Knt.* }
Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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*[160]

* Miles *against* Williams.

Case 88.

If debt be brought against a man and his wife, on a bond by the wife *dum sola*, they may plead a discharge by the bankruptcy of the husband; but if the plea conclude *hoc parati sunt verificare*, it is bad on a *special demurrer*; for it should have concluded to the country.

S. C. post. 243. S. C. Gilb. 318. S. C. 1. Peer. Wms. 249.

DEBT UPON BOND brought against the defendant and his wife. They pleaded in bar, that the bond was entered into by the wife *dum sola*; that a commission of bankruptcy issued out against the husband, who in all points conformed himself to the statute about bankrupts; and so both defendants say, that by virtue of the statute he became a bankrupt, *per quod* the debt was discharged; *et hoc parati sunt verificare.*

To this plea the plaintiff demurs specially.

FIRST, Because a bond entered into by the wife *dum sola fuit*, is not discharged by the bankruptcy of the husband.

SECONDLY, Because they ought to have concluded their plea to the country.

* MR. SALKELD, *for the plaintiff*, argued, that at the common law, no persons were allowed to avoid actions, by pleading disability in themselves (*a*). That properly speaking, no man can be

*[161]

(*a*) Beverley's Case, Cro. Eliz. 516. 4 Co. 123. The following cases were also quoted in the argument; Year Book 43 *Edw* 3. pl 95. Fitz. Abr. 1211. [illegible] 120. Drue v. Horn, Allen, Ludlam v. [illegible].

said

Miles against Williams.

said to be a debtor, but *ex suo contractu*. It is not pretended, that an executor would be excused and discharged, by this statute, of all debts he stands charged with as executor; and yet the executor is as properly a debtor as the husband in this case, marriage not at all altering the nature of the contract; for it was not in the power of the wife, by any act of her's, to dissolve her own contract, nor could the husband, for he is a third person. This indeed the husband can do, he can make himself liable; and this he has done *ratione connubii*; but this hinders not, but that the wife may still remain chargeable, *ratione contractus*. If the husband die, his executor is not chargeable with this debt; and if the wife die, the husband is not liable, which plainly shews it to be *properly* the debt of the wife. In the case of *Revell v. Grey* (a) it is resolved, that a debt of the husband and a debt of the wife cannot be joined in one action brought against husband and wife; which certainly they might, if so be that after coverture, the debt of the wife was, in a strict and proper sense, the debt of the husband. In the case of *Boylston v. Radcliffe* (b), *A.* and *B.* were obligees in a bond, one of them becomes a bankrupt, and it was resolved, that this debt was not assignable. If this bond had been made to husband and wife, it had reached the equity of the present case; for it seems plainly against equity, that a debt due from the wife should be discharged by the bankruptcy of the husband; and yet that the creditors of the husband cannot have the benefit of debts due to the wife. * And though chattels personal cannot remain in jointure after marriage, yet *choses in action* may. The husband cannot sue alone upon a bond given to the wife *dum sola*, which proves it a debt still due to the wife. As the nature of the contract is not altered by the marriage, but only the power of the wife suspended; so neither is the nature of the contract altered by bringing of the action. But indeed, after judgment, *transit in rem judicatam*; and it is the judgment that gives the husband a new right, and will make it go to his executors.—But surely this Court will never esteem an act of bankruptcy of equal force with a judgment. The plea ought to cover the wife as well as the husband; but the wife is not a bankrupt, because the husband is so; for by the law of *England*, the wife shall share in the honours and advantages, but not in the *pœnis et criminibus* of her husband. A man covenants not to sue husband and wife, upon a bond entered into by the wife *dum sola*, during the life of the husband; afterwards, contrary to this agreement, he puts the bond in suit; this covenant cannot be pleaded in bar, but must be pleaded in abatement only. It was further insisted upon, that no plea could be good for the husband and wife, but such a plea as would have been good for the wife had she remained unmarried.

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MR. FORTESCUE, *for the defendant*, insisted, that what was due to the wife was, in the strictest sense, a debt belonging to the

(a) Hob. 184 (b) 1. Lev. 17. S. C. Raym. 5.

husband;

husband; for the very definition of a debt, according to *Bracton* (a), is what a man can recover by action, and that to his own use. The last part of the definition was what he chiefly relied upon, as that which distinguished it from the case of *Boylston v. Radcliffe*, about the joint obligees; and also from the case of an executor, who * sues *jure repræsentationis, in alieno jure*; and recovers not for himself, but for another's use. In *Calvin's Lexicon*, "a debtor" is defined to be one that may be sued against his will; and so may the husband. Against an executor who is sued as such, the action must be in the *detinet* only; for the word "*debet*" would not be true, since he is not sued for his own debt, but the testator's; whereas an action brought against husband and wife must be in the *debet* and *detinet*; which shews, that the law of *England*, upon marriage, considers the debts of the wife as the debts of the husband (b). In this case no remedy is to be had against the wife: she cannot be taken in execution; and therefore the husband, who alone is liable to execution, is debtor. A release by the husband, in case of a debt to the wife, would be a release in his own right; whereas an executor releases *in alieno jure* (c). So when the husband sues, he sues in his own right, derived to him from the marriage (d). It is true, that a debt due upon a bond made to the wife *dum sola*, will (unless recovered by the husband) survive to the wife: but from thence it necessarily follows, that this must have been a debt vested in the husband at the time of his death, according to the rule among joint-tenants, that nothing accrues to the survivor, but what was in jointure at the time of the death of his companion. *Nihil accrescit ei, qui nihil habuit in re unde accresceret jus.* If now a debt due to the wife *dum sola*, does vest in, that is, become due to the husband, by a parity of reason a debt due from the wife *dum sola*, ought to be esteemed a debt from the husband, that is, a debt of the husband's. Nor is it any objection against its being esteemed his debt, that he is chargeable with it during his life only; for as a feoffment made by tenant in tail creates a fee-simple, though it is possible the fee-simple may * last but an hour; so though the husband is only chargeable with this debt during his life, yet as long as he lives it is his debt. *Choses in action* are assignable (e). By the statute 1. *Jac.* 1. c. 15. debts for the benefit of the bankrupt are assignable.

Meere against Williams.

Cases quoted, Noy, 142. 505. 2 Keble, 331. 1. Chancery Rep. 71.

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* [164]

THEN *it was argued*, that there was no inconvenience in making the debts due to the wife assignable; for this is no harm to the wife, since she knew that the husband had power to receive or assign her interest (f): but great inconvenience of the other side, by enabling the bankrupt to shelter all his estate (by assigning it) in the name of his wife, and so putting it out of the power of the

(a) Bract. Lib. 3. cap. 1.
(b) Year Book 20. Hen. 6. pl. 22. 9 Edw 4 pl. 24.
(c) Hale's Analysis of the Law, page 47.
(d) Year Book 47 Edw. 3. pl. 23.
(e) Year Book 2[illegible]. Hen. 6. pl. [illegible]
(f) 1. Cro. 1[illegible]7. 1. Vent. 10. 1 Keb 167.

commissioners

MILES *against* WILLIAMS.

commissioners of bankruptcy. Suppose, in case of such an assignment, the bankrupt will not (because it is not for his interest), and the assignees of the commissioners cannot sue, What becomes of the estate in the mean time? If then debts due to the wife are, as well as other debts, due to the husband, assignable to the commissioners, common equity requires that debts due from the wife should be discharged by the statute of bankruptcy, as well as those that are due only from the husband. This construction is even advantageous to the plaintiff, by preventing him from suing a bankrupt; one that he can get nothing by, unless he be a felon, which is not to be supposed. It is something strange that a man should be both a bankrupt and not a bankrupt at the same time; a bankrupt as to his own estate, but not as to his wife's. It was observed from the clause in the act, whereby it is criminal for bankrupts to conceal monies or effects, whereof any person in trust for them stands possessed, that it is plain that the bankrupt is bound to discover a bond entered into to the wife *dum sola*; and if he is bound [165] to discover, then it must be assignable; and consequently, by parity of reason, a bond debt from the wife *dum sola*, must be discharged.

REPLY *for the plaintiff*. The case of the release is not to the purpose; for it must be a release of "all demands;" and that will release the debt to the wife, because the husband only could demand it: but a release of "all actions" would not release it (*a*). A bond given to *a feme sole*, is not forfeited by the outlawry of the husband (*b*). As to the case of a bond given to a *feme sole*, who marries, and her husband dies, it is an improper expression to say the bond *survives* to the wife, it does indeed *remain* to her. It is true, that debts in trust for the bankrupt are assignable; but surely it does not from thence follow, that a bond entered into, to the wife *dum sola*, is so; for such a debt can never be said, in the original or creation of it, to be a debt in trust for the husband; and if such a bond is not discoverable, it is not assignable, and by parity of reason this debt is not discharged. As to the inconvenience pretended, that this would open a way to shelter an estate under the wife's name, the answer is easy, that that can never be done without fraud, which will vitiate the whole contrivance.

SIR THOMAS POWYS, lately a Judge in the court of king's bench, desired the next time this case was spoken to, that it should be more distinctly argued, whether upon supposal that a bond made to the wife *dum sola* was assignable to the commissioners, it did necessarily follow that the bankruptcy of the husband would discharge a bond given by the wife *dum sola*?

Adjournatur (*c*).

(*a*) Year Book 21. *Hen.* 7. pl. 29.

(*b*) Noy, 6.

(*c*) This case was argued again in Trinity Term, the thirteenth of *Queen Anne*, and the Court was of opinion that this was a debt provable under the commission of bankrupt, and consequently that it was discharged by his certificate; but judgment was given for the plaintiff, because the plea ought to have concluded to *the country*, and not with a *verification*. Fort. [illegible].

Gravenor

* Gravenor *against* Stephens. Case 89.

Matter pleadable in abatement, cannot be assigned as error in fact.

THIS was A WRIT OF ERROR; and an error in fact was assigned, *viz.* that the plaintiff was a *feme covert* at the time of the action brought.

Sed non allocatur; because it might have been pleaded in abatement. And it is a general rule, not to suffer that to be assigned for error in fact, which might have been taken advantage of by being pleaded in abatement.

Weltale *against* Glover. Case 90.

In debt on bond if the defendant plead *a release*, and the plaintiff reply that the release was not by deed, a conclusion *et de hoc ponit se super patriam*, is good.

ACTION OF DEBT upon a bond. The defendant pleaded a release. The plaintiff replied, that the release was not by deed, *et de hoc ponit se super patriam.*—The defendant demurred specially, because he ought not to have concluded, *et de hoc ponit se super patriam*, but *et hoc petit quod inquiratur per patriam.* Joinder in demurrer.

MR. DEE, *for the defendant*, argued, that though indeed both forms of speech bore the same sense, yet that the form of entries was always so; that *de hoc ponit se super patriam*, was the conclusion of the defendant's bar, and *hoc petit quod inquiratur per patriam*, of the plaintiff's replication; that known and received forms were to be observed; and that to depart or vary from them, was an obstinacy not to be encouraged, particularly when specially demurred to. It is said in the Year-Book of *Henry the Sixth (a)*, that every plea must have its proper conclusion. *Plowden (b)* says, that after pleading the special matter, the conclusion of the plea must be, *et sic non est factum*; which can be only for form sake, for the matter of special pleading shews the bond to be void without the conclusion. In a second deliverance, "*et de tali statu suo petiit inde* "*seisitus*," is a form always observed; and therefore the words *de tali statu suo* being omitted, though other words of the same * import were put in, it was held naught, and ordered to be amended (*c*). And if forms of law, unsupported by any necessity, nor founded in the reason of the thing, are to be strictly adhered to, the plaintiff ought not to be allowed the liberty of varying the received and known conclusion of his plea; though he has used expressions, it must be owned, equivalent in sense.

MR. AGAR, *for the plaintiff*, argued, that this way of pleading occasioned no inconvenience or alteration of law; and that the law does not always tie up men to any certain forms, provided they use other words as proper. When the plea is in the negative, as the plaintiff's replication here was, *et de hoc ponit*, &c. is a more proper

(*a*) Year Book 28. *Hen.* 6. pl. 19.

(*b*) In the case of Dive *v.* Manningham, Plowd. Com. fol. 66.

(*c*) Dyer, 247.

WESTALL *against* GLOVER.

conclusion than *et hoc petit*, &c. for a negative is not to be proved. And the reason why most commonly the plaintiff concludes one way, and the defendant another, may perhaps be thus accounted for, that most of the general pleas being in the negative, it would be somewhat absurd for a man who concludes his plea in the negative, to desire that his plea may be inquired of *per patriam*. He confessed that the general course of entries was against him; and that *Co. Lit.* 126. says it is so; but not that it must be so. Then he quoted *Rastall (a)*, and the case of *Jefferies v. Dee (b)*, where the precedents were all with him.

PARKER, *Chief Justice*. The difference taken by MR. AGAR, between negative and affirmative pleas, seems to me very reasonable. And I think it highly probable, that the original reason, why the entry for the defendant has been *et de hoc ponit*, &c. and that for the plaintiff *et hoc petit*, &c. might be, that for the most part general issues are in the negative, and replications in the affirmative. The question is not which way the stream and current

* [168] of precedents run, for that MR. AGAR gives up, and he * must do so; but whether it be a form so necessary, that a small variation (and that not in sense) from it will be erroneous, and, upon a special demurrer, prevent the plaintiff's having his judgment. Not one authority has been cited to prove this. MR. AGAR has mentioned four or five precedents, not to overthrow or alter the general form of precedents, but only to prove that this form of words is not essentially necessary. Besides, it is to be considered, that these words now objected to are legal words, not fanciful words of the party's own invention. For the writ of *venire* recites of both parties, *quod posuerunt se super patriam*; and then the entry, *prædictus querens* the plaintiff, &c. imports that he too *ponit se super patriam*: the very words here are objected to as improper for the plaintiff. So again, when the plaintiff concludes, *et hoc petit quod inquiratur per patriam*, &c. the entry is, *et prædictus defendens similiter*, &c. viz. *hoc petit*, &c. from whence it manifestly appears, that neither of these expressions are improper for either of the parties to use.

THE REST OF THE JUDGES being of the same opinion, judgment *nisi* was given for the plaintiff.

(a) Rastall's Entries, [illegible] 616. 6[illegible] (b) 1. Lev. [illegible]

Case 91. Skinner *against* Newton.

A declaration in trespass, that the defendant with force and arms, three *pieces* of land broke and entered, &c. of him the plaintiff containing so many acres, &c. is bad.—S. C. ante, 149.

THIS CASE was again spoken to this Term.

IT WAS INSISTED that the declaration was naught, by reason of the words *pieces terræ* used instead of *clausum*. It was observed, that

that there were several distinct species of actions of trespass, viz. *quare domum fregit*, where trespass in houses; *quare clausum*, where in land; *quare parcum*, when in parks; *quare piscariam*, &c. when in fisheries. * Might it not now be said, that *terram fregit* would do for any of these? for a grant of the land passes the fishery, house, &c. No, by no means; for if that might be allowed, the various species of actions of trespass would be all confounded. The word "*clausum*" imports possession, but so does not the word *pecia*. And from *Yelverton* 224. it appears, that there must be words setting forth the possession of the plaintiff by a necessary and not an argumentative implication. In *Rol. Abr. tit. Indict.* 80. the same rule is laid down in forcible entries. That the word "*clausum*" imports possession, appears from the definition of the word in *Du Fresne's Glossary*. *Somner* in his *Saxon Dictionary*, the best of the kind, says, that the expression *clausum fregit* is very ancient, and synonymous to our *English* word *hedge-breaking*; the law making the enclosure. Trespass in a common where all is open, must yet be *clausum fregit* (a). This way of declaration will serve for a highway, to which every body has a right. Where a man has a grant only of the herbage or vesture, he must declare *clausum*, &c. The word "*tenementum*" in forcible entries, is held bad for the uncertainty (b); and so is 2. *Rol. Abr.* 80. In 2. *Keble*, 358. the word "*curtilagium*," though more certain than *tenementum*, is yet held bad in an indictment for trespass. *Carucatam terrae fregit* is bad for uncertainty. *Peciam terrae* is bad in an ejectment (c). This is a formed writ in *the Register*, and therefore exactly to be complied with. If it be said, that this ought to be pleaded in abatement, it may be answered, that by 1. *Roll.* 176. it appears that this may be taken advantage of in arrest of judgment. And 1. *Rolle's Rep.* 2. this difference is taken, that where it appears to the Court from the writ itself, that it * ought to abate, there the Court, *ex officio*, ought to give judgment against the plaintiff, though the defendant do not plead it in abatement; otherwise, where this does not appear in the writ.

SKINNER *against* NEWTON.

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FOR THE DEFENDANT *in error it was argued, that the word* "*clausum*" does not, *ex vi termini*, import possession, without the addition of the word *ipsius* the plaintiff. That the only question was, Whether there was certainty enough in the description of this trespass, for the defendant to plead the recovery in this action of trespass, in bar of another action brought for the same trespass? and that it appears from the declaration, that for this purpose there is certainty enough. The end of the declaration in trespass is, to describe the trespass so certainly that the defendant may know how to answer.

EYRE, *Justice*. It is indeed a barbarous expression; but if *gardinum fregit* be good and in *the Register*, and also *hojium fregit*,

(a) See the Year Book, 26. *Hen.* 7. pl. 14. and 2. Lutw 1344.

(b) 1. Roll. 334.

(c) Mod. [illegible] 2. Vent. 174.

why

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why may not *terram fregit* be good too? The word *terra*, in legal process, must be understood of arable ground; though in way of grant, it may signify any thing. And if it be *terram* of the plaintiff, it is *clausum* of the plaintiff; for the law makes the inclosure. Besides, the defendant, after pleading to it, cannot take advantage of it in error.

But notwithstanding (*ut audivi*) in Trinity Term, in the thirteenth year of *Queen Anne*, judgment was reversed *nisi*.

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Case 92.

Nutton *against* Crow.

If an *assumpsit* on several counts be brought by *an executor*, on a promise made to the testator, and as to this count the plaintiff enters a *remittitur damna*, and obtain judgment on the others; the defendant cannot shew, in arrest of judgment, that it appears in the declaration that the probate was granted before the promise was made.

THIS was an *indebitatus assumpsit* upon three promises, brought by the plaintiff as executor to *B*. As to the two first promises, the declaration stood thus: that *Crow*, on the twenty-second of *January* 1708, *in vitâ testatoris* being indebted, &c.; and upon the defendant's craving *oyer* of the letters testamentary, a probate is recited as made four months before the time of the promises. The third promise was a promise to the executor himself, upon the stating of the accounts between the executor and defendant, touching only the dealings between the testator and him. The plaintiff entered a *remittitur damna* upon the two first promises given, and obtained judgment upon the third in the court of common pleas.

Upon error brought, two things were chiefly insisted upon.

FIRST, That it appeared of the plaintiff's own shewing, that this will was proved in the life-time of the testator, and so was a void probate. And it was said, that this was an objection that went to all the three promises; and therefore was not helped by the *remittitur*; for a void probate is no probate at all; and though an executor may release before a probate, yet he cannot bring an action. 9. *Co.* 38. *Co. Lit.* 292. *b. Plowd. Com.* 203. 1. *Roll. Abr.* 917.

SED NON ALLOCATUR; for it is as natural to say, that the time alledged for making the promises was mistaken, and then the probate may be good, as to say, *vice versa*, the promises were well set forth, and the probate void; especially when the party has, by entering a *remittitur*, yielded the promises to be naught.

A declaration in *assumpsit* by an executor, stating a promise made to himself upon an account stated, relative to the dealings between the testator and the defendant, is good. 2. Stra. 1271.

SECONDLY, That here were promises made to *the testator*, and a promise made to *the executor*, all joined in one action, which ought not to be (*a*). It was owned, that there is a difference taken between actions brought by, and actions brought against, an executor or administrator (*b*). That an executor might join in one action, a debt owed him *in his own right*, and a debt owed him *as executor*; but an executor could not be sued in one and the same action, for a debt due from him as executor, and a debt due from him on his own account. And the reason assigned for this difference, is, that in the first case the judgment remains

(*a*) (*b*) 2. Lev. 228.

still

HUTTON against CROOK.

still the same, notwithstanding the joining the two debts; whereas in the other, the judgment must be different, *viz.* in the one case *de bonis testatoris*, and in the other *de bonis propriis*. But then it was said, by way of answer to this case, that the reason given to support the difference had no weight. For though indeed, in the first case, the judgment must be the same, yet the effect of that judgment is very different; for the one debt is recovered to his own use; the other debt, when recovered, will be assets. And then the case of *Beamond v. Long* (*a*), and of *Rogers v. Cook* (*b*), contradict this case. A case in *Hobart*, 88. was owned a strong case against them; but they endeavoured to oppose it by other authorities, as *Hutton*, 27. 2. *Lev.* 110. and it was strongly insisted upon, that the nature of the action was changed, at least a new remedy given, by the taking of this account.

IT WAS ARGUED *for the defendant in error*, that *actions upon the case* came in the place of *actions of debt* upon *simple contract*, and were introduced merely to avoid the defendant's *waging his law*; and therefore both sorts of actions were to be governed by the same reason, and the same rules. That the nature of the action was not changed by the account, appears from the nature of the thing; for the debt after the account, as well as before, is due to him *jure repræsentationis* (*c*). It was said, that the law had a great regard to the original of a debt. *Cro. Eliz.* 326. *Savile*, 130. 2. *Cro.* 545. 1. *Lutw.* 893. are all of them authorities, wherein it is resolved, that from a consideration had to the first rise and original of the debt, the action must be brought in the *detinet*. *Lane*, 79. and *Hobart*, 88. were strongly relied upon.

THE COURT were of opinion, that the promises might very well be joined in one action: that the taking of the * account did not at all vary the nature of the debt: that the plaintiff lay under a necessity to introduce the cause of action, of naming himself executor: that the pleading being here the same, judgment the same, and the effect of the judgment the same, as it would have been in separate actions, there could be no reason given for dividing them, but multiplying actions, which the law abhors, and against MAGNA CHARTA, "*nulli negabimus, nulli differemus, &c.*" *Hobart*, 88. was held to be a strong authority for the defendant in error. But it was agreed by the Court, that an executor could not be sued for debts due from the testator and himself in one and the same action, because the judgment is different. * [175]

Adjournatur (*d*).

(*a*) Cro. Car. 227.

(*b*) 1. Show. 366.

(*c*) See the Year Book 20. *Hen.* 6. 4. and 5. ; 9. *Hen.* 6. pl. 11.

(*d*) A count for money had and received by the defendant, to the use of the executor as such, may be joined to a count for money had and received to the use of the testator; but a count for a debt due to the executor in his own right cannot. Petrie, Executor of Keble, *v.* Hannay, 3. Term Rep. 659. Nor can a count on a promise made by the defendant, as administrator, to pay money received by him as such to the plaintiff's use, be joined with other counts on promises made by the intestate. Jennings *v.* Newman, Administrator, 4. Term Rep. 347.

Case 93. The Queen *against* The Corporation of Buckingham.

Qu. If to a mandamus to restore a corporator to the office of burgess, it is a good return that he was *de facto* elected, but that not having received the sacrament according to 13. *Car.* 2. c. 2. his election was void. S. C. post. 178.

THIS was *a mandamus* to the corporation of *Buckingham*, to restore one *Muscot* to the office of a common burgess of that corporation.

The return in substance was, that *Muscot de facto fuit electus*; but that he not having received the sacrament within a year before his election, according to the statute 13. *Car.* 2. c. 2. his election was void (*a*).

MR. LECHMERE, *against the return*, argued, that the very foundation of *a mandamus* to restore, is the wrongful turning a man out of at least a possessory right to a franchise; and therefore properly, and in its own nature, it is a writ of restitution. And accordingly in the *Analysis of the Law*, now published from a manuscript of *Lord Hale*, it is expresly called a writ of restitution; which, *ex vi termini*, imports possession. It is not necessary for one who has a possessory right to a franchise, to have a legal title to it. This is in [174] its * own nature a freehold; and because it is *juris publici*, the law has a greater regard to the possession of such a freehold than to any of a private nature. If upon a presentment without title, institution and induction follow, the party has such a possessory right as he shall not lose without a *quare impedit*. The *debite admissus*, according to the constitution of the borough being not at all answered by the return, must now be looked upon as true; and for the same reason, it must now be taken for granted, that he has been guilty of no misbehaviour since his election. The admission, not the election, makes the officer; and though the statute says "the "election shall be void," it says nothing of the admission. There are various returns made to *mandamus's* to restore. "*Non fuit* "*amotus*," is the most common return; and this return goes to the very foundation of the writ. "*Non fuit admissus*," is a good return; amotion depends upon the admission; and therefore "*non fuit* "*admissus*," is but a special *non fuit amotus*. In the case of *The King v. Town of Cambridge* (*b*), *a mandamus* issued to admit *Love* and others, and a return of any subsequent incapacity was resolved to be a good return. Confessing the amotion and justifying is a very common sort of return. He observed, that in all these returns the election was not answered; from whence it follows, that it is not a necessary and essential part of the writ. In *James Smith's Case* (*c*), just after the Revolution, the election was answered; but then it was answered in such a manner, as plainly shews it not necessary to be answered. Besides, the argument does by no means hold, that because it was to be found in some returns, that they had answered the election, therefore it is a necessary part of the writ; but the ar-

1. Siderfin, 209, 210.

1. Lev. 162.

(*a*) See the case of The Queen *v.* The Mayor and Burgesses of Pomfret, Ante, 107, 108.; and The Queen *v.* The Borough of Aldborough, Ante, 100.

(*b*) 8. Mod. 148.

(*c*) 4. Mod. 52.

gument

gument holds strong the other way, that because it is often not answered, therefore it is no necessary part of the writ. He observed, that unless the reason returned for not restoring him was a good reason for their turning him out, it was not a good reason. * He affirmed, that a corporation, after their admission of him as duly elected, had no power or authority to call in question the title of him, or the rest of their members; and that it must by no means pass for granted, that they may disfranchise a man for every cause for which he may be proceeded against upon a *quo warranto*; because there is this great difference between proceedings by *quo warranto*, and the turning a man out; that in the former case, the man remains in possession of his franchise during the time the right is in dispute; whereas in the other, the man is all the while out of possession; which is a wrong, that restoring him afterwards does not make him sufficient amends for. *James Bagge's Case* (a) is a leading case as to *mandamus's*, and this was a *mandamus* to restore; and there it was laid down, that a disfranchisement ought to be founded upon some act done against the duty of a burgess. A power of disfranchisement is not a power incident to a corporation, and what the Court can, *ex officio*, take notice of; but it must be given by express words in the charter, and pleaded, which here it is not. If corporations have a power to judge of elections, they must necessarily judge of acts of parliament concerning them, they must judge the right of electors, &c. a jurisdiction too great to be supposed vested in a corporation. It seems absurd for a corporation to turn a man out for an act of their own, and not any fault committed by him; for the election is a corporate act; and shall they after they have allowed and admitted it good, by owning and receiving him as a member, be allowed to come and call this a void election? Then it was urged, that this is a very dangerous as well as needless power, because it would give a corporation a power to rid themselves of what members they please; for let a man have ever so much right on his side, yet he must lose his franchise during the whole time * of dispute; and it is likewise a very needless power, because the law has sufficiently provided for it by *quo warranto*.

THE QUEEN *against* THE CORPORATION OF BUCKINGHAM.

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ANOTHER EXCEPTION was, that it was not averred in the return that the reason they give for not restoring him, was the reason for which they turned him out. And that this is necessary appears from *Bagge's Case* (b), where it is expressly said in the return *ex causis praedictis amotus fuit*. And if this were not so, a wrongful expulsion might come to be a rightful one; for if it need not appear in the return for what cause he was expelled, any accident happening between the removal and the return will in fact justify the removal.

THEN IT WAS OBSERVED, that the return was contradictory to itself; for it was said, in the first place, that *de facto fuit electus*,

(a) 11. Co 93.   (b) 11. Co 97.

and

The Queen against The Corporation of Buckingham.

and afterwards that his election was void, he not having received the sacrament. Now *electus*, in one part of the return, must bear the same sense as in the other, unless the addition of the words *de facto* makes any alteration, which he supposed they did not.

Mr. Lutwyche *for the return* (*a*). The act of parliament of 13 *Car.* 2. c. 1. says, "that the placing election or choice of a "person not having, &c. shall be void:" and where an act of parliament makes a thing absolutely void, every person may and ought to take notice of it. No precedent is to be found of any *mandamus* without the suggestion of *debite electus et præfectus*, which supposes it a necessary part of the writ, and then necessary for it to be answered. There is a difference between an election void and voidable: that in the present case is not voidable, but void. And the act of parliament in saying the election shall be void, has in effect said, there shall be no proceedings by *quo warranto*. As to the case of the advowson, it is *nihil ad rem*, because there is no act of parliament in the case. But in the case of a simoniacal
* [177] presentation, notwithstanding institution or * even induction, the presentation is absolutely void; and the church may be presented unto as void, without bringing any *quare impedit*. In case of an ejectment, unless the person turned out, though by one that has no right, can prove his right, he shall not recover, and this is a possessory action. As to the objection, that this way a corporation may have it in their power to rid themselves of what members they please: the answer is, that this objection implies malice, and if a corporation be malicious, they may turn a man out for nothing, and then may return for cause any false crime they think fit, and in the mean time the man is out of his franchise.

Lechmere *in reply*. A great part of Mr. Lutwyche's argument turns upon this, that the statute makes the admission as well as election void; whereas the statute says not a word of admission, unless the word "placing" be interpreted to mean *that*. Now from the word "placing" being put before "election," it is highly probable that it had no relation, in the intention of the legislators, to admission, an act subsequent and consequential of election; and *ex vi termini*, "placing" no more imports admission than it does election. Possibly the term "placing" may, in the act, signify some other way of coming in than by election, *viz.* by patent, a frequent practice in those days when the act was made. As for the advowson; that was mentioned only to shew, that the law allows of a possessory right, even in matters of an incorporeal nature, as well as in land. As to simony, the act of parliament relating to that matter is very different from this, for it makes all void, as if the incumbent were naturally dead.

Adjournatur.

(*a*) In favour of the return the following cases were cited, Rex *v.* Thacker, 2. Jones, 131. Rex *v.* Stafford, 428. 5. Mod. 315. Rex *v.* Mayor of Abingdon, Salk. 431. 2. Lev. 184.

* Sir

* Sir Peter King made another argument, in the case of another person; but where the return was the very same as before.

First, He objected, that in the return they had not set forth, that the act of parliament made the election void; it was only said, that in default thereof, such placing, &c. was void," but not stated by what authority it was void.

Secondly, He objected, that the return had not brought the office within the act of parliament; for the office of capital burgess is not named in the act of parliament. It was, indeed, attempted to be brought within it two ways: First, By setting forth, that it was an office relating to the government of the town. But this is not enough, unless they had gone one step further, and shewn how the office concerned the government of the town, that so the Court might judge whether it did or not.— The second way is, that as the act mentions common-council-men, they said "*quod qualibet communis burgensis*" was, and has been since, a member of the common-council. But this is not enough, for they ought to have said, that "*quilibet communis burgensis, virtute officii praedicti*," was a member of the common-council.

> Q. [illegible] turn [illegible] was to [illegible] burgess, [illegible] was in fact [illegible] ed but [illegible] having taken [illegible] sacrament with- in a year, [illegible] election was void, it is ne- cessary to state that it was void by 13 Car. 2. c. 2 S. C. ante, 175.

Thirdly, He objected further, that the return had not sufficiently answered the writ. The writ says him to be *debite electus et praefectus*, which is no answer. They should have done as in pleading to bond usurious, or simoniacal, admitted the fact, viz. *quod debite fuit electus*, and that *electio devenit vacua*.

Fourthly, As the election is not properly answered, so neither is the *praefectus*. A man may come in either by *election* or by *praefection*, that is, placing in of the crown. They say, that * he was never at any other time *electus*, but it is not said, that he never was at any other time *praefectus*. * [179]

Powys, *Justice*, upon a former argument in this case, had desired the Counsel to consider, whether the act did not make the taking the sacrament a precedent condition to the office?

Sir Peter King, in answer to this, put the following case: Suppose a man having received the sacrament within the year, applies to be sworn in, is refused, then gets a *peremptory mandamus*, afterwards he refuses to subscribe, can any man say, that contrary to the express judgment of this Court, he was never elected? And yet the act of parliament is as strongly penned to make the election void for not subscribing, as for not taking the sacrament; therefore it is plain, that neither the omission of the one or the other makes the election void, but only capable of being avoided. This further appears from the case of *King v. Larwood* (*a*), for if the

(*a*) 4. Mod. 267.

taking,

THE QUEEN against THE CORPORATION of BUCKINGHAM.

taking, &c. had been in nature of a precedent condition, Larwood could never have been punished, because he would not have been legally chosen into the office (a). The statute *De Donis* says, a fine shall be *ipso jure nullus*; and yet the meaning is not, that it shall be absolutely void, but only that it shall not be a fine to bar the issue; for it is a fine to make a discontinuance, &c. The statutes relating to sheriff's bonds, and usurious bonds, are penned in very strong terms, and yet the bonds are void only as to their efficacy; for in those cases, one cannot plead *non est factum* (b). The statute about striking in church-yards says, "that the party *ipso*
[180] *facto* shall be excommunicate; and yet a proper process is necessary (c). If by the statute of Simony, the simoniacal presentation were entirely and to all intents and purposes void, the * queen would have no title at all to present; for it is the manner of the presentation that gives the queen the title. A thing may be void, and yet not to be avoided in every manner (d). He argued from the reason of the case *The King v. Turner* (e), that it did not lie in the breast of the corporation, contrary to their own admission, to call in question the validity of the original election; and though this would be no good answer to the crown, yet to the corporation it is, You have admitted him. In the last place, he held it necessary for it to appear in the return that they had summoned him (f).

EYRE, *Justice*, declared his present opinion to be, that the acts of parliament instanced to prove the election not *void*, but only *voidable*, did not reach the present case; because all of them related either to matters of record, or specialties entered into with some ceremony; and therefore although the statutes made them void, yet it must be understood in a proper manner, and acts of parliament do always suppose necessary incidents; but now this case is the case of an election, a matter *in pais*, and so very different.

(a) See Clerk's Case, 2. Vent 247. where the election was held void for want of taking the sacrament: See also, The Queen v. The Borough of Aldborough, Ante, 100.

(b) Cro. Eliz. 915. Dyer, 375. Hob. 72. 166.

(c) 2. vol Hawk P. C. ch. 63. s. 27. title "Affray."

(d) Hob. 166.

(e) T. Jones, 215.

(f) See Reg. v. Aldbrough, Ante, 101.

MICHAELMAS TERM,

The Twelfth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir Thomas Powys, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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*[181]

* Backhouse *against* Wells. Case 94.

A devise "to "*A.* for life, "without impeachment of "waste, and "after to the "issue male of "his body, with "remainder to "the heirs male "of the body of "that issue," conveys to *A.* an estate for life, with remainder to the issue in tail.—*Sed quære.*

THIS was an ejectment; and the question arose upon the construction of a will, whether the words of it made the devisee only tenant for life or tenant in tail.

The devisor being seised in fee of the lands in question makes his will thus: "To the intent that all my lands should remain in "my name and blood, I devise to *J. S.* my near kinsman, such "and such lands, &c. to have and to hold, for the term of his "natural life only, without impeachment of waste; then to the "issue male of his body, lawfully to be begotten, if God shall "bless him with such issue; remainder to the heirs males of the "body of that issue."

LUTWYCHE *for the plaintiff* argued, that the devisee was, by this will, only a tenant for life, and so consequently had no power to levy a fine, or suffer a common recovery, under which the defendant claimed. * That this was the intention of the testator appears, First, From the preamble, which signifies it to be his intention, that his lands should "remain in his name and blood;" from whence it is not probable that he would, by making the first devisee

*[182]

S. C. 1. Eq. Abr. 184.
S.C. 2. Stra. 738.
S. C. Fort. 45.

S. C. Gilb. 20. S. C. cited 8. Mod. 261. S. C. cited 2. Ld. Ray. 1430.

Restraints against Wills.

devisee tenant in tail, put it in his power, by suffering a common recovery, to bar, &c. Secondly, This appears to have been his intention from the words of the will, which are, "to have and to "hold for the term of his natural life only." The clause likewise "without impeachment of waste" had been needless, if the testator had designed to make him tenant in tail. And from the words, "to the heirs males of the body of that issue," it was inferred, that the testator plainly designed to vest the intail in the issue, and not the first devisee. If in a will such proper words are made use of as would in a deed pass such an estate, nothing but the plain intention of the testator to the contrary shall ever put another construction upon the words (*a*). A devise to a man and his children, where the man has no children, must pass an estate-tail, because it must be the intention of the testator to have it so; and otherwise the word "children" would be of no signification. The case of *King v. Melling* (*b*) is very different from the case at bar. There was not in that case the restrictive word "only," and the clause "without impeachment of waste," as in ours. Besides, there HALE argued strongly from the intention of the testator, which in a will, and also in an estate-tail, of which the statute says "*voluntas donatoris, &c.*" ought to carry great weight. Now

[183] here the intention of the testator is strongly with us. * From the difficulty with which the judgment was given in the case of *King v. Melling* it appears, the Judges went as far as they could go. And the case of *Taylor v. Sayer* (*c*) has been several times denied to be law.

LECHMERE *for the defendant* argued, that no such intention could be collected either from the preamble or from the words of the will. As to the preamble, it must be considered as a general preamble, that extends to the whole will, and consequently to all the devises in the will, as well as to the devise in question; and therefore, from the preamble it cannot appear, that it was his intention to make this devisee tenant for life, any more than some others that he has confessedly made tenants in tail. Indeed it does appear what were his motives in the choice he made of devisees, *viz.* their being of his name and family, but nothing further. As for the observation made from the clause "without impeachment of waste," it is in other parts of the will needlessly inserted, and so it may here. As to the inference made from those words, "if God shall bless "him with such issue," that they import a design of giving a contingent remainder to that issue; it was answered, that the preceding words, *viz.* the remainder "to the issue male of his "body lawfully to be begotten," were the operative words, and which, conjoined with those that precede them, vested an estate-tail in the devisee. As to the inference from the words "to the heirs "males of the body of that issue," that the estate-tail was vested in the issue; it was answered, that whether the estate-tail was vested

(*a*) Wylde's Case, 6. Co. 16.
(*b*) Reported in 2. Lev. 58. and fen, 106.
(*c*) 1. Vent. 229. Ray. 82. Pollex. 1. Vent. 225.

in

in the devisee or issue, those words must be superfluous; for issue being *nomen collectivum*, without saying more, imports an estate-tail. As to the expression, "for the term of his natural life only;" if the word "only" were left out, since the case of *King v. Melling*, it could be no objection. And as to that * word, it is plain tautology; for an estate for life is an estate for life only; and then the case remains the same with the case of *The King v. Melling*. "Issue" is no appropriate word of purchase in a will, though perhaps in a deed it may be so; and yet in the case of *Lee v. Brace* (*a*) the word "issue" was used in a deed as a word of limitation. In a will, it is a word that has no determined signification, but must be governed by other circumstances; and most commonly it is used as a word of limitation.

Backhouse against Wells. 1. Vent. 229. * [184]

Parker, *Chief Justice*, in the next Term, delivered the opinion of THE WHOLE COURT, that by the devise the devisee was made tenant for life, remainder to the issue in tail. The words of the will, he said, were so express to this purpose, that neither any words that could have been used, or any arguments, could make it plainer. This, he said, was both the obvious and legal import of these words, and what they would have imported in a conveyance (*b*).

(*a*) 5. Mod. 266. 2. Ld. Ray. 101. Say. 68.

(*b*) But see Morris v. Le Gay, 2. Burr. 1162. Goodright v. Pullen, 2. Ld. Ray. 1437. Blandford v. Aplin, 4. Term Rep. 82. Robinson v. Robinson, 1. Burr. 38. —See also Dunn on Demise of Webb v. Puckey, that by a devise to *A.* for life, without impeachment of waste, and after his decease to the issue male of his body, and to the heirs and assigns of such issue male for ever, and for default of such issue male to *B.* *C.* &c. *A.* takes an estate-tail. 5 Term Rep 299. Cooper and Others v. Collins, 4. Term Rep. 2[illegible].

* [185]

Jackson *against* Layeright.

Case 95.

THIS was a writ of error out of the court of common pleas, where an action upon the case was brought for inclosing so many acres of land, parcel *communiæ pasturæ*, &c.

It was urged, that the word "*communia*" signified, not the place, but the right of commoning; and a right being a thing of an incorporeal nature, was no more capable of being inclosed than a rent (*a*); and this definition of the word is given in *Fleta* (*b*), that it imports any right which a man is to enjoy in common with others *in alieno fundo*; as *communia pasturæ*, *piscandi*, &c. A grant of * *communia* alone would pass nothing. A grant of *communia pasturæ* would not pass the soil (*c*); *à fortiori* in pleading it cannot import the soil. "*Nec non*," in pleading, amounts to an affirmative; *contra* in a grant. The reason of the difference is, that in pleading the rules of grammar must take place, but in grants the intention of the party shall govern the construction. The

An action on the case for inclosing so many acres, "parcel. commu-nia pasturæ," is good after verdict; for though technically the word "communia" signifies the right only, and not the place of commoning, and, being incorporeal, is not the subject of inclosure, yet in common parlance it signifies *the common* itself.—S. C. Gilb. 13. 75. S. C. 5. Viner, 27.

(*a*) Bracton, lib. 4. cap. 4.

(*b*) Fleta, lib. 4. cap. 19.

(*c*) Cro. Jac. 579.

word

JACKSON *against* LAVERIGHT.

word "*tenentes*" in pleading never signifies tenants for years; but *tenentes terrarum* tenants in fee (*a*). The plaintiff himself, in another part of his declaration, has used the word "*communia*" in a proper sense, as signifying a right, *ratione inde communiam,* &c. *habuit*. If it be objected, that the word "*communia*" may be rejected as surplusage, yet even then the declaration will remain nonsense; for then it will be for inclosing so many acres *terræ*, viz. arable land (for that is the legal import of the word *terra*); parcel *pasturæ* (*b*).

Ante, 170.

IT WAS URGED *in favour of the defendant in error*, that this word "*communia*," if it made the declaration nonsense, should be rejected as surplusage. But it was strongly argued, that this word "*communia*" not being a classical but a legal and technical word, and being a word which in common parlance, nay in acts of parliament, sometimes signifies the place, as well as right of common, might, especially after a verdict, be received in the same sense; and many are the cases where improper and impossible words have been aided by a verdict (*c*).

8. Mod. 240.

EYRE, *Justice*. It is very hard, that after a verdict this word should not receive that sense which it will do in common parlance, nay in acts of parliament, and very good authors, as in *Du Fresne's Glossary*, *Vol. I.* upon this word.

* [186]

* POWYS *junior* was of the same opinion; for if the word was not capable of receiving this sense, he did not see why it might not, after a verdict, be esteemed a mistake of the clerk instead of *communis*. He likewise thought it might be rejected as surplusage; for though the legal import of the word "*terra*," when standing alone, is arable, yet the word "*terra*" in conjunction with other words will signify all sorts of land; as here "*acras terræ*" is conjoined with the following words, "*parcel. pasturæ terræ* "VOCAT." and thus no absurdity at all follows the omission of the word "*communia*."

Ante, 170.

Adjournatur.

JUDGMENT was afterwards given for the defendant in error.

(*a*) Rookby's Case, Michaelmas Term, 9. *Anne.*

(*b*) The cases quoted for the plaintiff in error were, 1. Vent. 260. 2. Vent. 73. 174. 262. Cro. Jac. 272. and the case of Braddock *v.* Wilson two years ago. —NOTE *to the former edition.*

(*c*) 3. Lev. 336. 1. Roll. Abr. 577. Stiles, 296.

Case 96.

The Queen *against* Nun.

[illegible] person under [illegible] examination [illegible] justices of [illegible] peace say, "[illegible]his is no justice's business; you shall not try this matter; have a care what you do; I have [illegible] blood in me, if I had you in another place;" it is not an indictable offence; for the words do not [illegible]ount to *a challenge*.—S. C. Gilb. 30.

THIS was an indictment found before the justices of peace, at the sessions, for these words spoken of justices of the peace by *Nun*, at such time as he was, by warrant, brought before them.

"This

"This is no justice of peace's business; you shall not try this "matter; have a care what you do, I have blood in me, if I had "you in another place: and upon *not guilty* pleaded, the defendant was found *guilty*.

The Queen v. Nunn.

It was moved *in arrest of judgment*, that these words are not indictable. In the case of *The Queen v. Langley (a)* it was resolved, that words are not indictable, unless they have a direct and immediate tendency, and not by construction and implication, to the breach of the peace. In the case of *The Queen v. Wrightson (b)*, calling a justice of peace "ass, fool, and coxcomb, for "making such a warrant," was held not indictable. In the case of * *The Queen v. Soley (c)*, saying of a justice of peace, "that he "would judge in any cause brought before him according to his "affection," was held not indictable. In the case of *The Queen v. Lycassel (d)*, saying of a justice of peace, "he deserved to be "hanged for making such a numskull order," was held not indictable. In the case of *Tuberville v. Savage (e)*, the defendant, laying his hand upon his sword, said, "If it were not assize-time, I would not "take such language from you;" and held no assault.—It was likewise insisted upon, that if these words were indictable, yet they were not indictable before justices of the peace, but *oyer* and *terminer*. * [187]

On the other side, *to maintain the indictment*, the case of *Lord Darcy*, in the Star-chamber *(f)*, was quoted, where, "You "lie, and I will maintain it with my life," were held words finable; and that this was a case in the Star-chamber is no objection to its authority, because whatever authority that court exercised lawfully, the same may this Court. It was likewise said, that the present case differed from all those cited in this, that though they were words spoken of justices of the peace, yet it was of justices when absent; whereas here the justices were present, and presiding at the sessions.

The Court inclined to the opinion, that the words are not indictable, as laid in this indictment, because they did not carry any necessary intendment of *a challenge* or intent to break the peace, as in *Lord Darcy's Case* the words do; especially when it appears, in this very indictment, that this *Nun* was a wheelwright, and so not likely to challenge or be challenged *(g)*.

(a) 9. Mod. 126. 2. Salk. 697. 3. Salk. 190.—See also 2. Roll. Abr. 78.

(b) Easter Term, 7. *Anne*. 2. Salk. 698.

(c) Mich. Term, 4. *Anne*.

(d) Hilary Term, 1712.

(e) 1. Mod. 3.

(f) Hob. 120.

(g) It is said, S. C. Gilb. 40. that the judgment was arrested, and, as it seems, on two grounds: First, Because the words could not, from the condition of the speaker, be understood as *a challenge*; and secondly, Because the indictment did not state that the charge on which *Nun* was before the justices, and in allusion to which he spoke the words, was a matter within their jurisdiction; for if it were not, it could be no crime to speak, in the language of the indictment, "*in* "*depravation of their authority*." Gilb. 39.

The

Case 97. * The Queen *against* Stafford.

Outlawry for high treason may be reversed for a wrong *addition*, which is an error in fact, and may be confessed.

STAFFORD had been outlawed for high-treason, and had obtained, from THE CROWN, a writ of error to reverse this outlawry.

The ATTORNEY-GENERAL had orders to confess in court the error assigned, which was an error in fact, *viz.* that he was outlawed by a wrong addition; which the ATTORNEY-GENERAL did accordingly.

The Court was therefore prayed, that the outlawry might be reversed.

On reversing an outlawry for *high treason*, there is no necessity to *warn the lords*, or to issue a *scire facias* to the *terre-tenants*.

S. C. Gilb. 46.

But PARKER, *Chief Justice*, was of opinion, that though in outlawry for *treason* there is no need of warning the lords, of whom the lands are held by a *scire facias* before the outlawry be reversed, as must be done in case of *felony*, because in treason the forfeiture is to the crown, yet he saw no reason to distinguish between outlawry for felony and outlawry for treason, as to the *terre-tenants*; for in case of treason, where the forfeiture is to the crown, the crown may grant these lands to others, who ought to be heard what they can say for themselves before they lose their lands. He thought, therefore, there should have been a *scire facias* to the *terre-tenants*; and grounded himself pretty much upon a case in the time of *Henry the Fourth* (*a*), where there was a *scire facias* to the *terre-tenant*; and though this was an outlawry for felony; yet the king's being immediate lord made it all one as if it had been an outlawry for treason.' And the entry in case of felony, as may be seen *Coke's Entries* (*b*), mentions the suing out of a *scire facias* as a thing of absolute necessity; without which the Judge could not reverse the outlawry.

But upon searching into precedents it was found, that in fact, in outlawry for treason there used to be no *scire facias*; and the precedents being so, and it being * a supposition, not of necessity, that THE CROWN should grant these lands, and then out the patentees, by suffering a writ of error to be brought, the outlawry was reversed.

(*a*) Year-Book . *Hen.* 4 pl. . (*b*) Co. Ent. 318.

Case 98. Turner *against* Goodwin.

To debt on bond conditioned to pay so much money, for [illegible] the obli- [illegible] had recover- [illegible] judgment a- [illegible]inst *A.* upon consideration that the obliger would forbear to sue out execution against *A.* and assign [illegible] the judgment, if the defendant plead, that the obligee had not assigned, the plaintiff may reply, [illegible] he was ready to assign the judgment; for the assignment is not a *condition precedent.* S. C. ante, [illegible]54. S. C. post. 222. S. C. Gilb. 40. S. C. Fort. 145.

THIS CASE had been argued last *Easter Term*, and came now to be spoken to again.

It was an action of debt upon a bond, conditioned for the payment of so much money, the plaintiff assigning over to the defendant such a judgment against *D.*

PRATT,

Turner *against* Goodwin.

PRATT, *Serjeant*, *for the defendant*, insisted, that the assigning was a condition precedent to the payment. It was said, that in the obligation there were very proper and significant words to make a condition, either precedent or subsequent; that therefore it should be taken either one way or the other, as would best answer the intention of the parties. Now the intention of the parties undoubtedly was, that the plaintiff should have the money, and the defendant the judgment. But this intention could never be supported, by taking it to be a condition subsequent; for the money being once paid cannot be brought back again, in case the judgment should not be assigned over. The law lays such a stress upon supporting the intention of the parties, that it will interpret words not at all proper to amount to a condition, rather than the intention of the parties should be violated; as the common case in *Co. Lit.* 24. of the grant of an annuity *pro concilio impendendo*. It cannot be objected, that the defendant ought to have concurred in doing this act, and requested the plaintiff to assign, &c. because this was an act that it was in the power of the plaintiff to perform alone; for the judgment would, immediately upon the assignment, vest [190] * in the defendant before his acceptance of it *(a)*.

SERJEANT CHESSHYRE *for the plaintiff* insisted, that the defendant was bound to do the first act, *viz.* to offer to pay the money, though he acknowledged that the payment of the money and assignment of the judgment were to be concomitant acts in the execution. He relied much upon the replication of the plaintiff, which, the defendant having demurred to it, must be admitted as true. In this replication the plaintiff says, that he was ready to assign, &c. and requested the defendant to pay the money, which the defendant refused. This refusal THE SERJEANT insisted to be an absolute refusal, and not a conditional one, *viz.* unless the judgment was assigned. And this absolute refusal of the defendant to pay the money he insisted upon to be a sufficient discharge to the plaintiff from preparing the assignment. He referred to the case of *Thorpe v. Thorpe* (*b*), where most of this sort of learning is stated.

Adjournatur (*c*).

(*a*) The cases quoted in the argument for the defendant were, Spring *v.* Cæsar, 1. Saund. 320. 1. Jones, 189. Edwards *v.* Hammond, 3. Lev. 132. Grey's Case, Cro. Car. 433. 5. Co. 78. Large *v.* Cheshire, 1. Vent. .; and the case of Butler *v.* Baker, 1. And. 348. Poph. 87.—NOTE *to the former edition.*

(*b*) 1. Lutw. 245.

(*c*) This case was argued again in Easter Term, 13. *Ann.*; and in the Term following, judgment was given for the plaintiff. S. C. post. 222.

Sestern *against* Cibber. Case 99

In an action of debt by the assignee of a bail-bond, it is fatal, on demurrer, to omit setting forth the [illegible] of the writ. [illegible] Gilb 77.

THIS was an action of debt upon a bond brought by the plaintiff as assignee of a bail-bond.

SKIPTEEN *against* CIBBER.

Upon demurrer, these objections were taken to the declaration:

FIRST, That the breach of the condition was set forth to be, his not appearing *secundum exigentiam brevis, et secundum formam brevis*; whereas it ought to have been, his not appearing at the return of the writ (*a*).

*[191] * SECONDLY, It was objected, that the very foundation of the action, *viz.* the breach, was set forth by way of recital, *cumque etiam non apparuit*; which ought to have been expressly averred, that so the defendant might have the liberty of traversing it (*b*).

THIRDLY, It is not set forth upon what day the writ was returnable; and then *non constat* whether he did or did not appear *secundum exigentiam brevis*; whether the bond was, or was not forfeited.

EYRE, *Justice.* This case differs very much from the case of a sheriff suing this bond himself; for there he has nothing to do but to declare upon the bond: but where the action is brought by the assignee, there it is the forfeiture that gives the action, which here is the non-appearance, and is a matter traversable, and must not be set forth by way of recital, but must be positively averred. It is true, that the declaring in an *indebitatus assumpsit* is *cumque etiam* he was indebted: so in a bond, *quod cum per quoddam scriptum suum obligator.* But then in the first case it is the promise, and in the second the breach of the condition, which gives the action; both which are ever positively averred, and not set forth by way of recital.

PARKER, *Chief Justice.* It is not true that there is no traversing what is only set forth by way of recital; for the pleas of "*non* "*assumpsit*" and "*non est factum*" are both of them pleas that traverse matters in those respective actions that are pleaded by way of recital.

The return of the writ not being set forth is a fatal objection (*c*).

Adjournatur.

(*a*) 1. Lev. 145. 2 Lev [illegible].
(*b*) Cro. Eliz. 441. 2. Jones, 197. 2. Lev. [illegible].
(*c*) See the case of Norton *v.* Syms, Hob. [illegible]; and Turner's Case, 8. Co. 132.—NOTE *to former edition.*

*[192]

Case 100.

* Johnson *against* Altham.

Writ of error upon action upon the case.

THIS was a writ of error out of the court of common pleas in an action upon the case.

IT WAS INSISTED *for the plaintiff in error*, that there should have been no final judgment, but a *respondeas ouster*.

S. C. post. 210.

BUT IT WAS INSISTED *by the defendant in error*, that it was the conclusion of a plea that made it either a plea in bar or a plea in abatement,

abatement, be the matter of that plea what it will; and that here the plea was concluded with a *petit judicium de narratione*, which is always the conclusion of a plea in bar; and therefore a final judgment was rightly given. **JOHNSON against ALTHAM.**

THE COURT. It is true, that it is the conclusion of a plea, be the matter what it will, that makes a plea a plea either in bar or in abatement. It is true likewise, that *petit judicium de narratione* is generally the conclusion of a plea in bar; for where there is either a writ or a bill, the demanding judgment of the declaration is a confession that the writ or bill is good: but the difficulty in this case arises from hence, that here is no writ or bill, but the declaration is the first step.

Adjournatur (a).

(a) The judgment of the court of common pleas was affirmed, post. 210.

The Queen *against* Muscot. Case 101.

A witness produced on the part of the crown on an indictment for perjury may be examined on the *voir dire* as to the degree of interest he has in the prosecution.

A QUESTION was started in an indictment for a judicial perjury, Whether one produced as an evidence for *the queen* might not be examined upon a *voir dire*, as the common usage is in civil actions?

IT WAS INSISTED, *by the Counsel for* THE QUEEN, that the question should not be put, because the consequence would * be, that no such prosecutions could ever go on; for there is scarcely any prosecutor but if asked whether he be interested in the event of a cause, must say he is. For example: Where the owner prosecutes an indictment of felony for stolen goods he is concerned in interest, for he will be intitled to restitution, and yet his evidence is admitted. So likewise, where an indictment is removed by *certiorari* from the sessions into the court of king's bench, notwithstanding the prosecutor in that case, if the defendant be convicted, is, by the statute of 5. & 6. *Will. & Mary*, c. 11. intitled to his costs, yet he is allowed as a witness. So likewise there are several cases where, though a man will, in case of conviction, be intitled to forty pounds, yet his evidence shall be received. And as to the cases of *The Queen v. Duke of Leeds* (a), and *The Queen v. Cobham* (b), where the informer was refused to be an evidence, there is this difference between those and the present case, that there it appeared upon the face of the record that the parties produced as witnesses were interested. In hue and cry, the evidence of the person robbed is always allowed as evidence.

* [193]

PARKER, *Chief Justice*. It is a principle of the common law, that every man shall be tried by a fair jury, and that evidence shall be given by persons disinterested. The law gives the party tried his election to prove a person offered as evidence interested two ways, *viz.* either by bringing other evidence to prove it, or else

(a) (b)

The Queen against Muscot.

by swearing the person himself upon a *voir dire*; but though he may do either, he cannot have recourse to both. It was never objected before, that a person should not be sworn upon a *voir dire*; nor will it, I hope, ever hereafter. Objections have indeed been started as to the nature of those questions, that shall be put to a witness upon taking such an oath. As to the case of robbery, that is founded upon the necessity of it, and that only. * As to the cases put upon the statutes where forty pounds reward, &c. they admit of this answer, that the intention of those acts will be quite defeated, if the reward were to take off their evidence. The same answer likewise may serve to the cases put upon an indictment of felony for stolen goods, and where the indictment is removed by *certiorari*, &c.; for who, in the first case, but the owner can prove the property of the goods? and in the second, if the giving of costs should take off the evidence of the prosecutor, that act of parliament, which was designed to discountenance the removing of suits by *certiorari*, would give the greatest encouragement to them that is possible. As for the distinction taken between the interest of the witness appearing upon record, and its appearing some other way, it is an irrational distinction, and a reflection upon the wisdom of the law. As to the objection taken from the inconvenience of putting the general and common question, because probably he must answer it in the affirmative, there is nothing in it, for he may be asked to explain the nature of his interest, that so the Court may be judge, whether his interest is such as ought to exclude his evidence.

*[194]

He was accordingly sworn upon a *voir dire*.

To convict a person of perjury, one witness is not sufficient to prove the falsity of the fact sworn.

Parker, *Chief Justice*, in summing up the evidence, said, *inter alia*, There is this difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent; and therefore a credible and probable witness shall turn the scale in favour of either party; but in the former, presumption is ever to be made in favour of innocence; and the oath of the party will have a regard paid to it, until disproved. Therefore to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous * than the evidence given for the defendant; for else there is only oath against oath.

*[195]

Perjury cannot be assigned on a mere *mistake* of a fact.

Secondly, A mistake is not enough to convict a man of perjury; the oath must be not only false, but wilful and malicious. I remember a case ruled by my predecessor, where a person swore, that he saw and read such a deed, and it proved upon the trial to be only the counterpart which he saw; and yet held no perjury, because only a mistake.

If a witness swear falsely and maliciously to a *circumstance* material to the issue, he may be indicted for *perjury*.—Salk. 513.

Thirdly, It is my opinion, that perjury may be committed in a circumstantial matter, though I do not remember that, in fact, it

it was ever carried ſo far. I have heard a caſe mentioned in King William's time, where the queſtion being put about the ſealing of a deed, it was ſworn that the party was, at ſuch a time, in ſuch a place, and conſequently could not ſeal the deed; and upon this oath he was convicted of perjury. But now, though the matter of this oath was but a circumſtance, conſidered in relation to the point in queſtion, upon the trial in which the oath was given, yet it was all his oath, his entire evidence. But if perjury may be committed in matter of circumſtance, it muſt be a material circumſtance; a circumſtance of that weight, that without it he could not hope to find credit with the jury.

HILARY TERM,

The Twelfth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir Thomas Powys, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

* Harrison *against* Thornborough. Case 102.

A declaration in slander, "*A.* got a witness to forswear himself in such a cause; you or he, (*innuendo* the plaintiff, hired one *B.* to forswear himself— and "Two dyers are gone off (*innuendo* become bankrupt), and for aught I know *A.* will be so too," is good.

THIS was an action for these words: "*Harrison* got a witness to forswear himself in such a cause: you or he (*innuendo* the plaintiff) hired one *Bell* to forswear himself:" and for these following words, spoken at another time: "Two dyers are gone off (*innuendo* become bankrupt), and for aught I know *Harrison* will be so too within this time twelvemonth:" a verdict for the plaintiff, and joint damages were given.

IT WAS MOVED *in arrest of judgment*, that the words are not actionable; for though the first branch of the words, if they were alone, are certain enough, yet when he goes on and says, "You, or the plaintiff, hired one *Bell* to forswear himself," it becomes altogether uncertain to whom the words relate; and to this purpose were cited 1. *Roll's Abr.* 81. and 1. *Cro.* 497. where the words were, "one of you three, &c."

SECONDLY, The declaration does not set forth, that what the witness * was forsworn in was a material point in the cause.

* [197]

S. C. Gilb. 114. Hob. 268.

THIRDLY, Supposing the words are actionable, yet if the following words, that were spoken at a different time, are not actionable,

HARRISON *against* THORN-BOROUGH. able, then, the damages being joint, the judgment must be arrested.

FOURTHLY, Those words are not actionable, because the words "gone off" are capable of various constructions, and were therefore to be taken in the most favourable sense. In the case of *Chapman v. Lampire* (*a*), the words were, "He is broken, run "away, and will never return again;" and the Court were divided (*b*). Salk. 513.

FIFTHLY, If the words themselves are not actionable, the *innuendo* will not help it; for an *innuendo* is not to set forth new matter, but to refer to something already mentioned in the declaration. In the case of *King v. Greep*, the word "*Newnham*," INNUENDO "*Newnham*, in *Devonshire*;" and in 4. *Co.* 20. a. "burnt my barn," *innuendo* "full of corn;" the *innuendoes* were held void, because they set forth new matter.

SIXTHLY, That the action would not lie, unless *Bell* had actually forsworn himself; which perhaps the words "got, &c." do not necessarily imply.

THE COURT was of opinion, that the plaintiff should have judgment. Precedents in actions for words are not of equal authority as in other actions, because *norma loquendi* is the rule for the interpretation of words; and this rule is different in one age from what it is in another. The words which an hundred years ago did not import a slanderous sense now may; and so *vice versa*. In this kind of action for words, which are not of very great antiquity, Hob. 268. the Courts did at first, as much as they could, discountenance them; 4 Co. 20. and that for a wise reason, because generally brought for contention 5 Cro. 277. and vexation; and therefore when the words were capable of two [198] constructions, the Court always took them *mitiori sensu*. * But latterly these actions have been more discountenanced; for men's tongues growing more virulent, and irreparable damage arising from words, it has been by experience found, that unless men can get satisfaction by law, they will be apt to take it themselves. The rule therefore that has now prevailed is, that words are to be taken in that sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them. The words "you or he, &c." do not render the former uncertain; for they relate not to the "getting, &c." but to new matter, *viz.* who paid the money. Besides, if the words were, "*A.* or *D.* did, "&c." either *A.* or *D.* might bring an action; but then there must be an averment, that neither of them did it.

It is not necessary to the maintaining of this action, that *Bell* did forswear himself.

The signification of the words "gone off" are very well known among merchants.

(*a*) 3. Mod. 155.

(*b*) The plaintiff's Counsel, in answer to the uncertainty of the words, quoted the following authorities; Latch 219. 2. Keb. 718. Stiles, 142. Cro. Jac. 407. Raym. 217. 1. Lev. 277. 1. Cro. 236. Dyer, 72.

The

The doctrine laid down concerning *innuendo's* is undoubtedly true, when understood of matters of fact; but here the *innuendo's* are not introductory of new matters of fact, but only explanatory of the foregoing words. HARRISON *against* THORN-BOROUGH. Hob. 2, 3. 6. 45.

JUDGMENT was given for the plaintiff.

*[199]

The Queen *against* Delme. Case 103.

THIS was an information against *Delme*, for exercising the office of alderman in the city of *London*, not being duly chosen. In an information *quo warranto* against an alderman, *the array* may be challenged, if returned by an *alderman* or a *freeman*.

THE COUNSEL *for the Queen* challenged THE ARRAY, because * one of the sheriffs was one of those returned to the court of aldermen.

This challenge being allowed, a *venire facias* was directed to the other sheriff. Salk. 152. Hob. 235.

THE COUNSEL *for the defendant* challenged THE ARRAY, because returned by a sheriff that was concerned in interest, as he was a freeman of the city of *London*.

Upon this a *venire* was directed to the coroner.

THE COUNSEL *for the Queen*, before any return, entered a suggestion upon record, setting forth, that the question to be decided upon this trial being, whether the right of election was in the freemen only, or in all those who paid scot and lot (freemen or no freemen), it appeared, from the nature of the thing, that it was impossible for an impartial jury to come out of *London*, and therefore they prayed *a venire* to the sheriff of *Surrey*, the adjacent county. On an information *quo warranto*, *quære*, whether the crown can change the *venue*, on a suggestion of probable partiality, after having challenged *the array*, and a new *venire* has issued.

IT WAS NOW MOVED *to set aside this suggestion*, as being out of time, and inconsistent with what they had before admitted upon record. For it was insisted, that this suggestion containing no new matter arising subsequent to, or not known at the time when, upon the allowance of the challenge to the array, for the partiality of one sheriff, the *venire* was prayed to the other and granted, it was now too late to make it. But what was most strongly urged was, that the Counsel for the queen, by challenging the array, and praying a *venire* to the other sheriff of *London*, had thereby admitted upon record that an impartial jury might come out of *London*; and therefore they should not now, in dis-affirmance of what they had before admitted, be allowed to make this suggestion. It was said, that these suggestions were in their nature odious, as tending to put things out of the usual course of law. These suggestions being in the nature of challenges, whatever cases would prove such sort of challenges unlawful, * must, by parity of reason, prove the illegality of the suggestion (*a*). *[200]

(*a*) Cases quoted were 22. *Edw.* 4. 804. 4. *Edw.* 4. 6. Dyer, 25. 2. f. 3. pl. 11. Cro. Jac. 55, 6. 15. *Hen.* 7. Rolle, 657. Earl of Kent's Case, 2. 9. Robinson's Entries, pa 144. Moore, Rolle, 643.

The Queen against Dilme.

In the following Term

IT WAS INSISTED, *in favour of the suggestion*, that the defendant, by his challenge to THE ARRAY, had destroyed whatever admission upon record the suing out the *venire* to the other sheriff might amount to. For the sake of having trials fair, and to prevent delay of justice, challenges are favoured in law; hence it is allowed by law to make several challenges at the same time (a). Though a challenge be *in esse* at the time of the former, yet if the party had not, by reasonable intendment, notice of the cause of challenge, he is not estopped. Now this suggestion depends entirely upon the knowledge of the customs of the city of *London*, which customs the crown is a stranger to. Besides, there is no arguing from proceedings at law between subjects to suits where the crown is party, because the crown has several privileges above a subject; as the crown may waive their demurrer, take issue, and waive that issue (b). The crown may change their own *venue* (c). The queen may amend her pleadings at any time; nor will any *estoppel* bind the crown (d).

Adjournatur (e).

(a) Co. Lit. 158.
(b) Vaughan, 65.
(c) Dyer, 55. 1 Vent. 17.
(d) Hob. 339. 1. Sid. 12.
(e)

*[201]

Case 104.

Abrahat *against* Brandon.

A release awarded to be made to the time of the award, is good; for it is not to be intended that any new difference has arisen between the time of the submission and of the award.

THE ARBITRATORS, taking notice of the difference between the parties, award, that the defendant shall pay to the plaintiff so much money upon the first of *April*, so much upon the first of *May*; and that the parties shall pay one pound five shillings each to the arbitrators for the trouble; and that upon payment *prædict.* * *monet.* upon the first of *May*, the parties should give mutual releases to the time of the making the award.

IT WAS OBJECTED to this award, that it was made *ex parte tantum*; for nothing was awarded in favour of the defendant but the release, which the defendant had no remedy for at law; for the plaintiff was not by the award bound to make the release until after payment *monet. prædict.* upon the first of *May*. Now *monet. prædict.* refers not only to the sums awarded to be paid upon the first of *May*, but all the sums, and therefore to the sum awarded to be paid to the arbitrators, which part of the award is entirely void.

A release of all, &c. to the time of the submission is a good performance of an award, ordering a release to be given of all, &c. to the time of the award, for that part of the release which extends to the intermediate time out of the power of the arbitrators.—S. C. Gilb. 118. Hob. 49. 50.

SECONDLY, That the release awarded by the arbitrators is a release exceeding their power, which extends only to the time of submission; whereas the release, according to the award, extends to the time of the award made.

THE

THE COURT was of opinion, that the award was good; for *monet. prædict.* shall refer to all the sums that concern the justice of the award, but not that sum which does not, and as to which the award is void. ABRAHAT against BRANDON.

And as to THE SECOND OBJECTION, it is capable of two answers; one a common one, *viz.* that it shall not be intended that any new difference has arisen between the time of the submission, and of the award, unless it be shewn especially that there has. The other answer is, that a release of "all, &c." to the time of the submission, is a good performance of an award, ordering a release to be given "of all, &c." to the time of the award. Salk. 74. Salk. 75.

PARKER, *Chief Justice*, said, he took down this from *Chief Justice* HOLT's own mouth, in the case of *Freeman v. Bernard* (*a*).

THE COUNSEL likewise quoted *Lutw.* 524. 549. to the same purpose. The reason is plain, because that part of * the release which extends to the intermediate time exceeds the power of the arbitrators. * [202]

Judgment was given for the plaintiff.

(*a*) Salk. 69.

The Queen *against* The Corporation of Helston, in Cornwall. Case 105.

A point of law suggested by the Court on a trial, if rejected by the Counsel in whose favour it would have then prevailed, is not a ground on which the Court will grant a new trial.

THE QUESTION was, Whether, if upon a trial, a point in law be started by the Judge, and the Counsel do not take it up, but insist upon other facts, which are found against them, whereas, had the Counsel insisted upon the matter of law stirred by the Judge, the verdict must have passed for them, this is sufficient cause to move for a new trial?

PARKER, *Chief Justice*. The granting of new trials is of late original; it began about the year 1652, when the first new trial was granted for excessive damages. Experience shews that they are grantable, as well for a fault in the Judge as for a fault in the jury, in causes tried at *nisi prius*; because a Judge of *nisi prius* acts rather in a ministerial than in a judicial capacity; and the ground and foundation of granting new trials, when either the Judge or the jury are to blame, is one and the same, *viz.* doing justice to the party. The question in this case I take to be this, Whether we are so bound down by forms of law, as that though we see a verdict given contrary to a point of law (which the Judge himself took notice of, and yet, for want of the Counsel's doing their duty to their client, was not insisted upon), we cannot grant a new trial? When a point of law arises, whether the Counsel insist, or do not insist upon it, the Judge is bound to direct the jury accordingly. But yet, if the supporting of this verdict be of no more ill consequence than in point of costs, and the party has another remedy left him, then I am of opinion, that

Salk. 649. 653. 1. Wilf. 98. 1. Term Rep. 84. 5. Term Rep. 7.

THE QUEEN *against* THE CORPORATION OF HELSTON, IN CORNWALL.

that the party ought to suffer for the neglect of his * Counsel. But if the verdict binds and concludes the right of the party, then I think it hard that the party should lose his right by a mistake or slip of the Counsel.

POWYS *senior*. It would be of vast inconvenience if the bare stirring of a point at *nisi prius*, and which, for aught appears, neither the Judge, the Counsel, or the jury, thought upon more, should be a ground for granting a new trial; for it may be, the reason why it was not insisted upon by the Counsel was, because they knew the other side had evidence that would give it a full answer, by quite altering the fact. What happens now accidentally may hereafter happen designedly; matter may be slided in by the Counsel, and then dropped, only in order to move for a new trial; and it is better to suffer a particular inconvenience, than to open the way to a general mischief.

EYRE, *Justice*. The mistake of the Judge or jury is a good cause of granting a new trial; but I never yet heard, that the mistake of the Counsel was so. The Counsel stands in the place of his client; and therefore, if the Counsel waive a point, it is the same as if the client did it himself.

POWYS *junior*. If, in an action of debt upon a bond, a defendant, who has a good defence upon the merits, should, by advice of Counsel, hazard his cause upon a demurrer, which is adjudged against him, this mistake of Counsel would not be allowed in chancery as a good cause of relief.

PARKER, *Chief Justice*. There must be no new trial. And I so far assent to my Brothers, that though a verdict should leave the party remediless, yet if the Counsel do not only not insist, but expressly waive it, that then there ought to be no new trial.

* [204]

Case 106. * Barnardiston *against* Fowler.

An award made on the 23 *June*, ordering one of the parties to pay so much for rent that will become due on the 24 *June*, is void. S. C. Gilb. 125. Kyd on Awards,

PARKER, *Chief Justice*, delivered the resolution of the Court, The points in this case are two: FIRST, Whether the award be a good award? and, SECONDLY, Whether the breach be well assigned?

As to THE FIRST we are of opinion, that the award is a void award, though it was not insisted upon by the Counsel; and that for this reason: The award was made the twenty-third day of *June*, and the award orders so much rent, which by the award itself appeared not to be due until the twenty-fourth, to be paid by *A*. to *B*. in satisfaction of six pounds which the arbitrators adjudged to be owing to *B*. Now this rent being due upon a day subsequent to the award, the clause in the award concerning it was void, 1. *Roll. Abr.* 145. *pl.* 8. is an express authority; and the reason is plain, *viz.* because the rent may become extinct, either by surrender or eviction, before it is due. And this clause being

void;

void, the whole award becomes void too; for though an award may be void in part, and good for the rest, yet this must not be when it is void in that part that concerns the justice of the award, which is the case here; for if mutual releases are to be given, though the rent be not paid according to the award, B. will be without remedy for that money which the arbitrators acknowledge to be due to him. *Saunders*, 292. *Cro. Jac.* 584.

BARNARDISTON *against* FOULYER.

Ante, 201.

But, SECONDLY, supposing this to be a good award, we are of opinion, that the breach is not well assigned; for the submission being of "all suits, &c. between *A.* and *B.*" and the award pursuing the very words of the submission, *viz.* "that all suits, &c. "between *A.* and *B.* should cease," * it is evident that neither the parties to the award, nor the arbitrators, designed the former that their submission, or the latter that their award, should extend to suits depending between *A.* and *B.* and others. But be the intention of the parties what it will, the law is plain, that the prosecution of a suit between *A.* and *B.* and others, is no breach of such an award. The case of *Brockas v. Sir John Savage* (*a*) is a much stronger case; because husband and wife are, to many purposes in law, considered as one person. If a *certiorari* issue to return the record of a suit between *A.* and *B.* and the return is of a record between *A.* and *B.* and *C.* the record is not removed.

Breach of an award not well assigned.

* [205]

In *Michaelmas Term*, in the twelfth year of *William the Third*, this was held in *Brown's Case*, on an indictment in this court; and the case is the same as to orders.

Salk. 145.

JUDGMENT was given for the defendant (*b*).

(*a*) 1. Roll. Abr. 246

(*b*) Cases quoted *arguendo*, 2. Mod. 227. Green *v.* Stanford. 2. *Rob* 3. 18. 1. Rolle's Abr. 261. 2. Rolle's Abr. 412. 20. *Hen* 6. 41. Gle *v.* Rell, 1704. affirmed in the house of lords.—Note *to the former edition.*

* [206]

Aubry *against* Fortescue.

Case 107.

THE PLAINTIFF declared, that the defendant being indebted to the plaintiff *pro opere et labore*, &c. promised him, on the first of *April*, to pay him the money upon the first of *May*, &c.

To an *assumpsit* brought on a promise to pay 1st *May*, the defendant pleads the statute of Limitations.

The defendant pleaded the statute 21. *Jac.* 1. c. 16. in bar, *non assumpsit infra sex annos.*

The plaintiff replied, that he was beyond sea at the time the action accrued, and that the action was begun within six years *post reditum.*

Quære, If a replication stating that he was beyond sea when the cause of action accrued, and that the action was begun within six years after his return, be good.

The defendant demurred, and the plaintiff joined in demurrer.

FOR THE PLAINTIFF, *Turner's Case* (*a*) was quoted, that if the bar be bad in substance, and there is a replication only to avoid the bar, which replication is vicious, * and to this replication the defendant demurs, yet the plaintiff must have his judgment,

6. Com. Dig. "Temps" (G. 1)

(*a*) 8. Co. 132.

because

becauſe though the replication be naught, yet not being to enforce the cauſe of action, but to avoid the bar, which is bad in ſubſtance (for the bar ſhould have been *actio non accrevit*, and not *non aſſumpſit* (*a*)), it is no prejudice to the plaintiff.

What was moſt materially inſiſted upon *for the defendant* was, that the whole record was what the Court were to found their judgment upon; that therefore, if it appeared upon the whole record that the plaintiff had no cauſe of action, whether by reaſon of declaration, bar, replication, &c. (not material which), the plaintiff could never have judgment. And here the plaintiff, by his own replication, had quite deſtroyed his cauſe of action; for he admitted that he had not brought his action within ſix years after the cauſe of action accrued, but took ſanctuary in the ſaving clauſe of the ſtatute of Limitations. The queſtion therefore was, Whether the matter ſet forth in his replication brings him within the ſaving clauſe of the act? Actions of *aſſumpſit* are not mentioned in the ſaving clauſe; and conſequently it is plain, that the plaintiff is not intitled to the benefit of the ſaving, by the letter of it. And that the ſaving in the ſtatute of Limitations is not to be extended according to equity, the reſolution in *Bynion's Caſe* (*b*), that the ſhutting up of courts *tempore guerræ* does not likewiſe fall under the ſaving, a reſolution often approved of by *Chief Juſtice* Holt, is an expreſs authority.

The Court was ſtrongly of opinion for the plaintiff.

Sed adjournatur.

(*a*) See Salkill *v.* Warman, ante 1[illegible]4. (*b*) Salk. 420.

*[207]

Caſe 108. *The Univerſity of Cambridge *againſt* The Archbiſhop of York; OR, Vavaſor *againſt* Crofts.

If a *quare impedit* be brought in the name of "The chancellor and ſcholars of *Cambridge*," according to a charter ſet forth, the defendant cannot in a plea in bar, give them another name, without ſhewing a different charter.

S. C. Gilb. 248.
2. Stra. 816.
2. Ld. Ray. 1178. 1541.

THIS was a writ of error out of the court of common pleas, upon a *quare impedit* brought by the chancellor and ſcholars of the Univerſity of *Cambridge*, againſt *the Archbiſhop*, &c. founded upon the ſtatute of 3. *Jac.* 1. c. 5. which diſables popiſh recuſants convict from preſenting, &c. and veſts ſuch preſentations in the chancellor and ſcholars of the two univerſities reſpectively.

The queſtions upon this caſe were two:

First, Whether the defendant's plea in abatement, *viz.* that the Univerſity of *Cambridge* were incorporated by the name of "chancellor, maſters, and ſcholars, &c." and that therefore they had ſued by a wrong name, was a good plea: for if ſo, the court of common pleas erred in awarding a *reſpondeas ouſter*.

It was insisted *in behalf of plaintiff in error*, that it was a good plea in abatement; and for this purpoſe were cited the Year-

Year-Books 4. *Edw.* 4. 7. 22. *Edw.* 4. 34. and 13. *Hen.* 7. 14. name of a corporation compared to the name of baptism (*a*).

THE UNIVERSITY OF CAMBRIDGE *against* THE ARCHBISHOP OF YORK; OR, VATASOR *against* CROFTS.

CHESSHYRE, *Serjeant, for defendant in error*, argued, that a corporation may have one name by which they may take, and another by which they may sue (*b*); therefore *non sequitur* that, because the University was incorporated by this name, they cannot be impleaded, or sue by another. He argued, that the act of parliament vesting this right in them, by the name of "chancellor "and scholars," was an incorporating of them by that name, *quoad* this particular * purpose. This, he said, could be done by letters patent (*c*); *à fortiori* by act of parliament; and if this should be so, then the very act of parliament is a falsification of the plea. A plea in abatement must be certain to every intent (*d*). It was said likewise, that there was another rule as to pleas in abatement, *viz.* that the defendant must never set aside the writ of the plaintiff, without shewing a better. He insisted, lastly, that this variance was not a material one; because a man by becoming master does not cease to be a scholar. *[208]

THE COUNSEL *for the plaintiff in error* replied, that if the case were really so, that the University of *Cambridge* had one name to take, and another to sue by, that this ought to have been shewn by the other side; that the act of parliament operated only by way of *descriptio personæ*, as in a devise, and not by way of incorporating them; that admitting this statute did incorporate them, as to this purpose, by the name, &c. yet the acceptance of a new charter by another name, made it necessary for them to sue by that name.

PARKER, *Chief Justice*. The declaration sets forth the act of parliament, as an authority to sue by that name, which puts it upon the defendant to shew some special matter to avoid it, as the acceptance of another charter by another name subsequent to the act.

POWYS *senior*. "Chancellor and Scholars" is such a name as comprehends the whole University, for it includes both head and members.

EYRE, *Justice*, and POWYS *junior*. *Non sequitur*, that what will be sufficient to amount to a *descriptio personæ* to enable a person to take, will be sufficient for him to sue in. [209]

The record of refusing to make the declaration according to 3. *Jac.* 1. c. 5. is tantamount to a conviction.

* THE SECOND QUESTION in this case was, that the university of *Cambridge* had not sufficiently pleaded the conviction for want of "*ideo convictus est*."

BUT TO THIS *it was answered*, that the record of the default was a conviction of itself; and therefore the special conclusion of *ideo convictus est* is superfluous and unnecessary.

(*a*) Fitz. Abr. "Devise," pl. 27. and the case of the Dean and Chapter of Christ-Church v. Perrott, 4. Leon, 190.

(*b*) 1. Roll. Abr. 513.

(*c*) Year Book 2. *Hen.* 7. pl 13.

(*d*) Co. Litt 303 a.

And

VAVASOR *against* CROFTS.

And to this opinion THE COURT inclined.

This last question depended upon statute 1. *Will. & Mary*, sess. 1. c. 26.

Adjournatur.

Case 109. Parker *against* Langly.

In an action upon the case for a malicious prosecution, the plaintiff, in his declaration, must shew what became of the malicious prosecution.

S. C. ante, 145.

S. C. Gilb. 163.
Salk. 15.

PARKER, *Chief Justice*, delivered the resolution of THE COURT to be, that the declaration was naught, for want of shewing what became of the former action; whereas it ought to have been shewn, that that was false and hopeless. As the declaration now stands, the first suit may either be determined, or it may be deserted, or it may be still going on; and *non constat* which of these three is the matter of fact. If the first, *non constat* whether determined for or against the plaintiff; if for the plaintiff, then there is no colour for this action. If the second were the matter of fact, desertion is an indication of its being false and hopeless, and then indeed this action would be maintainable: and for this purpose there is a very strong case in *W. Jones*, 93. If the third be the matter of fact, then the action is brought too soon. In the reign of *Richard the Third* (*a*), it was held by all the Judges, that the first action must be first determined, because "*non intelligitur*," says the book, "*quousque terminetur* that the action was unjust (*b*)." No man can say of an action still depending, that it is false or malicious. The same rule holds in criminal cases (*c*). * [210] In an action for a malicious indictment, the plaintiff must in his declaration shew what became of the indictment (*d*). A verdict, or a plea in bar admitting and confessing the first action to be false and hopeless, may cure this defect in a declaration (*e*). The admitting this declaration to be good notwithstanding this omission, would introduce great absurdities, *viz.* inconsistent and incongruous verdicts in different actions. Indeed, if the first action go off by nonsuit, it may be said, that in another action brought for the same cause, there may be a verdict given inconsistent with the verdict given in the present cause. This may be; but the possibility of such a verdict in a future and not existing action shall not hinder a man from bringing such an action as this. The entries (*f*) uphold this opinion.

JUDGMENT was given for the defendant (*g*).

OBITER DICTUM by THE CHIEF JUSTICE in this resolution, that where the title is of one sort of action, there the declaration

(*a*) Year-Book 2. *Rich.* 3. pl. 9.

(*b*) Dyer, 284. Hob. 267.

(*c*) Yelv. 116. 1. Sid. 15. 1. Saund. 228. * 2. Keb. 476.

(*d*)

(*e*) Raym. 418. 2. Keb. 456. 753. 3. Keb. 781.

(*f*) See Ashton, 40. Brownlow Redivivus, 61. Robinson, 91.

(*g*) See Fisher *v.* Bristow, Dougl. 205. Lewis *v.* Farrel, 1. Stra. 114. Morgan *v.* Hughes, 2. Term Rep. 225.

can never change it to another; but it may make a fatal variance between the writ and the declaration. 1. *Ventris*, 19. 2. *Rolle's Rep.* 49. PARKER against LANGLEY.

Johnson against Altham. Case 110.

Pleading. S. C. ante, 192.

PARKER, *Chief Justice*, delivered the resolution of THE COURT to be, that the judgment of the court of common pleas should be affirmed. "*Petit judicium de billa*" is the form of pleading in abatement: * "*Petit judicium de narratione*" the form of pleading in bar. Demanding judgment of the declaration is understood to be demanding judgment of the case in the declaration. The demanding judgment of the bill is as much as to say, 'Since the declaration is your case, which it is always supposed to be, you have brought a wrong bill.' In this case, there being no bill upon the file, and the declaration being the very first step in the cause (which undoubtedly is erroneous, for every cause must begin either by writ or by bill), neither of these two forms of pleading were proper: not "*petit judicium de billa*," for there was none; not "*judicium de narratione*," for it was not the case in the declaration, but the want of a bill, that was the error. The defendant, therefore, in the original action should have concluded his plea thus: "*petit judicium si respondere compelli debeat.*" * [211]

The Queen against Blagden. Case 111.

In *quo warranto* for exercising the office of *portreeve*, if the defendant set forth his right, and traverse the usurpation, a replication taking issue on the *usurpation*, without noticing the *title*, is bad. S. C. post. 296. S. C. Gilb. 6. 145.

THIS was AN INFORMATION, in nature of a *quo warranto*, against *Blagden*, the defendant, to know by what authority he exercised the office of *portreeve* in the borough of *Honiton*.

The defendant in his bar set forth his right to that office; and concluded with a traverse, ABSQUE HOC that the defendant usurped the office.

The crown in its replication, taking no notice of the special title set forth by the defendant, joined issue upon the traverse "*quod usurpavit*, &c."

And upon this demurrer was joined.

POWYS *junior*. I ever took it, that in this case the ABSQUE HOC, &c. was but mere matter of form, and a respectful way of concluding the plea.

*PARKER, *Chief Justice*. The question turns upon this, Whether the traverse be only matter of form? for if so, THE CROWN cannot take issue upon it; but if it be a material part of the plea, most certainly THE CROWN may do it. [212]

Adjournatur (*a*).

(*a*) This case was argued again in Easter Term, 1. *Geo.* 1. and judgment was given for the defendant. S. C. post. 299.

Case 112. The Queen *against* Green:

Quære, If a penal statute say, that prosecution shall be in so many days, whether they shall be inclusively or exclusively taken.

THE COURT was moved to quash a conviction upon the statute 8. *Anne*, c. 18. against a baker, for selling of bread.

Exceptions were taken to the conviction.

THE FIRST EXCEPTION was, that it appears upon the conviction, that information was given the *eighth* day of an offence done upon the *fifth*, and the act of parliament requires the information to be given in *three days* after the offence committed.

PARKER, *Chief Justice*. It is not settled, whether the time in this act of parliament is to be taken inclusively or exclusively; for the law allows no fraction of a day. General computation of time in penal laws is taken inclusively.

EYRE, *Justice*. This is a point that has never been settled.

POWYS *senior* was of opinion, that the three days were to be reckoned exclusively.

An information that an offence was committed at the house or shop of *A.* situate, &c. is good.

1. Term Rep. 241.

THE SECOND EXCEPTION was, that the conviction sets forth the bread to be bought "*apud domum mansionalem sive shopam*" of the baker, situate in the parish of *St. Sepulchre*, in the county of *Middlesex*, within the jurisdiction of the justices; and it was said, that it is uncertain whether the bread * was bought at the shop or the house, and uncertain which of the two were situate in the county of *Middlesex*, within the jurisdiction, and consequently uncertain whether the justices had jurisdiction?

* [213]

POWYS, *Justice*. Both house and shop must be situate, &c. for the word "situate" plainly relates to both.

In an information on a penal statute, it is sufficient to state, that the defendant was *duly* summoned.

THE THIRD EXCEPTION was, that the conviction sets forth, that being *debite summonitus*, and not appearing, they proceeded, &c.; whereas natural justice requires, that the defendant should have had a reasonable time allowed him for the making his defence.

PARKER, *Chief Justice*. This is a material objection. It is not said, that he was summoned to appear at a certain time, or any time, or when the summons was made.

POWYS *junior*. It is to be considered, whether, when it is said that he was *debite summonitus*, the word *debite* does not import all reasonable circumstances relating to that summons; and I am of opinion it does (*a*).

A conviction must state the evidence given by the witness.

Salk. 369.

THE FOURTH EXCEPTION was, that the evidence upon which he was convicted is not set forth. It is said, indeed, that the witness was sworn *de veritate præmissorum*; but it does not appear what the answer of the witness was; it is only said, that it did appear,

(*a*) That *appearance* supplies the place of summons, the cases of The King *v.* The Mayor of Walton, and The Queen *v.* King were quoted.—NOTE *to former edition.*

from

from what was ſworn to the juſtice, that he was guilty; but it ought to have appeared ſo to the Court, from the nature of the evidence, ſpecially ſet forth.

THE QUEEN *againſt* GREEN.

And THE COURT was of this opinion (*a*).

EYRE, *Juſtice*. There may be another exception taken to the conviction; for I am very doubtful, whether a juſtice of peace can, by this ſtatute, upon default, proceed to judgment.

The conviction was quaſhed *niſi*.

(*a*) See Rex *v.* Baker, 1. Stra. 316. Rex *v.* Cheed, 2. Stra. 919. Rex *v.* Lloyd, 2. Stra. 999. Rex *v.* Simpſon, ante, . poſt. Rex *v.* Vipont, 2. Burr. 1163. Rex *v.* Aikin, 3. Burr. 1786. Rex *v.* Kempſon, Cowp. 241. Rex *v.* Killet, 4. Burr. 2062. Rex *v.* Read, Dougl. 469. that the evidence muſt be ſet out in the conviction.

* [214]

Jones *againſt* Gwynn.

Caſe 13.

THIS was an action upon the caſe, wherein the plaintiff declared, that he had always maintained a good and honeſt character among his neighbours; that he got his livelihood by exerciſing *legitimo modo* the faculty of a badger of corn or grain: and that the defendant, *præmiſſorum non ignarus*, *ſed malitioſè intendens*, &c. cauſed him to be indicted for exerciſing the trade of a badger without a licence, *contra formam ſtatuti*. Upon this declaration there is a joinder in demurrer.

A declaration in an action on the caſe for maliciouſly proſecuting the plaintiff, ſtating, that the indictment was brought "*falſely* "*and maliciouſly*," but not adding, "*without* "*reaſonable or* "*probable* "*cauſe*," is good; for though the want of probable cauſe ought to appear upon the declaration, yet it need not be ſtated in thoſe words; but it muſt ſhew that the proſecution is at an end.

S. C. ante, 148.

PARKER, *Chief Juſtice*, delivered the reſolution of the Court, that judgment ſhould be given for the plaintiff.—The exceptions taken to the declaration were four. THE FIRST and moſt material one was, that the indictment was declared only to be brought "*falſò et malitioſè*," but not "*abſque rationabili et probabili* "*cauſâ*." This action cannot, indeed, be ſupported, unleſs the indictment was groundleſs, and without a probable cauſe; but no one authority was cited to prove, that theſe very words are neceſſary to be uſed; and there are many authorities wherein they are wanting (*a*). If an averment of the plaintiff's honeſty, &c. and that the defendant *præmiſſorum non ignarus* will import theſe words, here they are. * But the true anſwer to this objection is, that the word "*malitioſè*" implies it to be *abſque rationabili et probabili cauſâ*, and a great deal more. The word "*malitia*" is an abſtract of *malus*, which imports what is wicked, and can admit of no poſſibility of excuſe. Among THE ROMANS, it ſignified a mixture of hatred and fraud, and what was utterly repugnant to ſimplicity and honeſty: and thus it is defined by CICERO, in his third book *de Natura Deorum*, and in his third book of *Offices*. Thus it is uſed in the civil law, and thus in our's. What we call *malice implied*, is murder, attended with ſuch circumſtances as can admit of no excuſe. My *Lord Coke*, in his expoſition of the ſtatute of

* [215]

S. C. 1. Salk. 15. S. C. Gilb. 185.

(*a*) Cro. Jac. 193. 1. Roll. Abr. 113.

Weſtminſter

JONES *against* GWYNN.

Westminster the Second (a), says, that "an appeal brought *per* "*malitiam* is an appeal that wants a foundation, and is groundless." In conspiracy, these words are used (b). The indictment of a man for what a civil action might have been brought, imports malice (c).

THE SECOND EXCEPTION to the declaration was, that the plaintiff had not averred that he was licensed to exercise the trade; this has been held neither necessary nor proper; but he has said enough, *viz.* that *legitimo modo* he exercised the trade of a badger.

THE THIRD EXCEPTION to the declaration was, that it was not said that he was acquitted by verdict. But the word "*acquieta-*"*tus*" imports acquittal by verdict (d).

THE FOURTH EXCEPTION to the declaration was, that the prosecution of this indictment could not be a malicious one, because the plaintiff in his replication has confessed *that* which was a
[216] probable cause for it, *viz.* the using the trade of a badger. * To this it may be answered, that this is no probable cause; for it is not the exercise of the trade, but doing it without a licence, that constitutes the crime.

And now I come to THE MATTER IN LAW, *viz.* that the exercising the trade of a badger, not being, &c. is not an offence indictable; and if so, it is said, the action is not maintainable. The force and strength of this objection may be resolved into the six following points:

FIRST, An acquittal upon an insufficient indictment will not intitle a man to the plea of *autrefois acquit* to another indictment for the same offence.

SECONDLY, That conspiracy lies not where the indictment was insufficient.

THIRDLY, That conspiracy lies not but for such an indictment upon which the defendant was so acquitted, as that he may plead his acquittal in bar of another indictment.

FOURTHLY, By a parity of reason it may be inferred, that an action upon the case will not lie likewise, upon an indictment for a matter not indictable; and upon which, consequently, there could not be such an acquittal as could be pleaded in bar of another indictment.

FIFTHLY, That where the matter of the indictment, though it be not indictable, is infamous and scandalous, an action upon the case will lie; but that it is otherwise where the indictment contains matter neither indictable nor scandalous.

(a) 2. Inst. 331.
(b) Staunf. P. C. 172. b.
(c) 2. Mod. 306.
(d) See Wicks *v.* Fentham, 4. Term Rep. 247.

SIXTHLY,

SIXTHLY, That this action lies not, because upon this indictment the party was never in danger; for judgment could not possibly be given against him. Jones against Gwynn.

I shall meet with all these points in speaking to the four following propositions:

FIRST, That to the supporting of this action it is not at all material, whether the indictment was sufficient or insufficient.

* SECONDLY, That there can be no argument drawn from a parity of reason between *actions of conspiracy* and *actions upon the case*. [217]

THIRDLY, That there is no foundation for such a distinction, as where the matter of the indictment is scandalous, and where it is not.

FOURTHLY, That the party's being in danger, or not in danger, upon the indictment, is not at all material.

As to THE FIRST POINT, *viz.* that the sufficiency or insufficiency of the indictment is not at all material to the supporting of this action; it is to be considered, that the grounds of this action are, on the plaintiff's side, *innocence*, and on the defendant's, *malice*. The damage a person may sustain by an indictment may relate either to his person, his reputation, or his property; and each of these is resolved, in the case of *Savil v. Roberts*, to be a just ground of this action (*a*); and damage in the last respect, *viz.* to *property*, is there looked upon as strong as any. It is true, that in the case of *Chamberlain v. Prescot* (*b*), there is a resolution not so agreeable with that of *Savil v. Roberts*, which yet the late *Chief Justice* HOLT, in his excellent argument upon the case of *Savil v. Roberts*, where he gives the resolution of the Court, seems unwilling to deny to be law, though he might. I own my opinion to have been, at first, that where the indictment was neither scandalous, nor sufficient, this action would not lie, but upon further consideration I have changed my mind; for the imprisonment, the vexation, and the expence, are the same upon * a groundless and insufficient indictment as upon a good one; for quashing an indictment is not always in a man's power; demurring is hazardous, and what a man in prudence would not do when he is sure of being cleared by a verdict; and if upon a demurrer there be any difficulty, it is equally expensive with an acquittal upon verdict. But it is the expence, not the *quantum* of the expence, which is material (*c*). And as the plaintiff is equally damnified by an insufficient as sufficient indictment, so the malice of the defendant is not at all less because the matter was not indictable; nay, it is rather an aggravation (*d*). The only *remora* to those actions is the fear of discouraging just prosecutions; but to this, malice is a full and sufficient answer (*e*). It is certainly not reasonable

See p. 149

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(*a*) 5. Mod. 394. 405. 1. Ld. Ray. 374. 12. Mod. 208. Carth. 416.
(*b*) Raym. 135.
(*c*) Year-Book 3. *Edw.* 3 fo. 19. 3. Cro. 291.
(*d*) 1. Roll. Abr. 112.
(*e*) 3. Cro. 563. Raym. 135.

JONES *against* GWYNN.

fonable, that more favour fhould be fhewed to a bad indictment than to a good one. It ought to be confidered, that a fmall flip vitiates an indictment; and if that fhall protect a man from an action, a way is opened for the malicious to ruin the innocent; for how eafily may a flip be made on purpofe? To the cafes cited in maintenance of the objection, I anfwer, that one is 9. *Edw.* 4. 12. an action of confpiracy; and there I allow the law to be fo. The other is 1. *Rolle's Abr.* 110, which is indeed a cafe to the purpofe; but then I obferve, that the foundation of the refolution is built upon the parity of reafon that was fuppofed to be between confpiracy and this action now before us.

And therefore I come now to my SECOND POINT, *viz.* to fhew that there is no arguing from one fort of action to the other.—

* [219] * Actions of confpiracy are the worft fort of actions in the world to be argued from; for there is more contrariety and repugnancy of opinions in them than in any other fpecies of actions whatever. I readily admit, that unlefs the indictment be either determined, or deferted, this action is not maintainable (*a*). Confpiracy lies not without acquittal; and the reafon of this, and the only one, is, becaufe this is a formed action, and the form of the writ in THE REGISTER is fo (*b*). The cafe of *Smith v. Cranfhaw* (*c*) is a notable cafe, where feveral good diftinctions are taken between cafe and confpiracy. There is certainly no arguing from an action which is a formed one, for which there is a formal writ in THE REGISTER, to an action upon the cafe, that is tied down to no form at all. If an action upon the cafe be brought upon an indictment, where the jury find *ignoramus*, there is no poffibility that there can be an acquittal (*d*). *Similiter* where indictment *coram non judice* (*e*). *Similiter* where an indictment is infufficient, and goes off on that account (*f*).

THE THIRD PROPOSITION was, that there was no reafon for making a difference, when the matter of the indictment is fcandalous, and when not. The cafes before mentioned fpeak not a word of this difference; and if fcandal be mentioned, it is only mentioned in the nature of damage (*g*).

[220] *THE FOURTH PROPOSITION was, that the danger of the party was not material. It is not the danger, but the expence, which is the ground of damage. All the danger in this cafe, if the indictment had been good, would only have been incurring a fine; *et antea ostenfum*, the *quantum* of the damage is not material.

Page 218.

When upon an indictment *ignoramus* is returned, or when the indictment is *coram non judice*, the party is in no danger at all, yet this action lies.

Judgment for the plaintiff.

(*a*) Yelv. 116.

(*b*) Regifter, 134. b.—See alfo Year-Book 17. *Edw.* 2 509. 9. Co. 56. Cro. Jac. 130. 1. Roll. Abr. 114.

(*c*) Reported W. Jones, 94. 1. Cro. 15. and likewife 1. Roll. Abr. 112.

(*d*) Cro. Jac 190. 490. Palm. 44 Styles, 10. Raym. 118. 1. Roll. Abr. 114.

(*e*) Stiles, 372. 378.

(*f*) Cro. Jac. 32. Yelv. 46. Stiles, 372. 157. 3. Keb. 141.

(*g*) W Jones, 93. Stiles, 378.

The

The Queen *against* The Inhabitants of Manchester. Case 114.

IT was moved to quash an order of justices for the payment of two shillings a week, until further order, to *H.* for the relief of herself and four poor children.

An order of relief must state, that the object of it is poor and indigent.

THE FIRST EXCEPTION was, that the order did not set forth that *H.* was indigent, which is the very foundation of the justices jurisdiction.

S. C. Gilb. 137. S. C. Sett. & Rem. 21.

And for this reason the order was quashed.

THERE WAS ANOTHER FAULT in the order, *viz.* that the money was made payable "until further order," whereas it should have been "during her poverty."

An order of relief "*until further order*" is bad.

Sed vide contra, Salk. 534.

EYRE, *Justice.* Had this been an order for settlement, the not naming the children had been a fault.

An order of removal must name the children.—Salk. 488. 1. Mod. Cases in Law and Equity, 337.

* The Queen *against* Dunn, or Parishes of Halifax and Overton, in the West Riding of Yorkshire. Case 115.

AN ORDER OF TWO JUSTICES was made upon the father-in-law, for maintaining the widow of the son.

An order for maintenance of a poor relation must state the ability of the party.

It was quashed; because it was not set forth in the order, that the father was of sufficient ability, in which case only the act enables the justices, &c.

EASTER TERM,

The Thirteenth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir Thomas Powys, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

* [222]

* Turner *againſt* Goodwin.

Caſe 116.

To debt on bond conditioned to pay ſo much money, for which the obligee had recovered judgment againſt *A.* upon conſideration that the obligee would forbear to ſue out execution againſt *A.* and aſſign over the judgment; the aſſignment is not a *condition precedent*; and therefore if the defendant plead that the obligee had not aſſigned; a replication that the plaintiff was *ready to aſſign*, is good.—S. C. ante, 154. 189. S. C. Gilb. 40.

IT WAS AGREED on both hands that the queſtion was no more than this, Who was obliged to do the firſt act? for if the judgment was to be aſſigned before the payment of the money, then judgment muſt be for the defendant; but if, &c.

SALKELD, *for the defendant*, ſaid, that theſe acts of paying the money and aſſigning the judgment, were alternate acts, which cannot go on *æquis paſſibus*, but there muſt be a priority in law. That in law, proper and formal words of condition are not required, either in wills, grants, or contracts. Nor in wills (*a*). Nor in grants (*b*); as in the grant of an annuity *pro conſilio impendendo:* but the reaſon aſſigned by *Coke* not a good one; for the true reaſon is, that the law implies * a condition, becauſe elſe there would be no remedy (*c*). The caſe chiefly relied upon for the defendant was the Year-Book of *Henry the Fourth* (*d*), which was

(*a*) Cro. Eliz. 46. 454. 2. Roll. Rep. 68.
(*b*) Co. Lit. 204.
(*c*) Gray's Caſe, 5. Co. 78.
(*d*) 14. *Hen.* 4. pl. 19.

* [223]

debt

TURNER *against* GOODWIN

debt upon bond, conditioned, that if the defendant resigned his living by such a time, for a certain pension to be conveyed to the parson, then, &c.

REEVES, *for the plaintiff*, urged, that the words "assigning "the judgment" did not make a condition precedent, from the necessary import of the words; and to shew this several authorities were quoted (*a*), where this way of expression was used, and yet not held a condition precedent. It is objected, that the condition of a bond is always to be taken in that sense that is most favourable to the obligor, which is, that this should be a precedent condition. This rule is generally true, but not always (*b*). It is also objected, that if the money must be first paid, the defendant is without remedy for the judgment. But I answer no, for the plaintiff in that case becomes a trustee to the defendant for the judgment; the assigning of the judgment, being only a deed to manifest that trust (*c*). Assigning a *chose in action*, is interpreted as a covenant against the assignor (*d*); and therefore if the money be paid, and no judgment assigned, it is a breach of covenant. In case of a mortgage, money is always paid first. This assignment must make mention of the money as paid first; since otherwise it will want a good consideration, and be void, for it will be maintenance (*e*).

[224] * To this it was answered, that the assignment need not recite the money as paid, but only the bond and the special agreement.

Lastly, this distinction was offered by THE COUNSEL *for the plaintiff*, in answer to several cases, that if by the agreement of parties two acts are to be done, and time is limited for the doing of one, and no time for the other; there, if the nature of the thing will bear it, that thing is to be done first for which the time was limited (*f*).

Afterwards, in next Term, judgment was given for the plaintiff.

(*a*) 3. Cro. 146. 201. 454. 2. Roll. 68. T. Jones, 205.

(*b*) 5. Co. 23. 1. Vent. 255. 2. *Hen.* 7. pl. 8, 9.

(*c*) But to this it was replied, that this was not a remedy in law but in equity.—NOTE *to the former edition.*

(*d*) 1. Mod. 113.

(*e*) 3. Leon. 234. Noy, 52. 3. Cro. 552. 170. 34. *Hen.* 6. 30. Brook "Maintenance" 8, 1. Bulstrode, 187.

(*f*) 1. Vent. 147. 1. Saund. 319. 1. Lutw. 251. 1 Cro. 384. 2. Saund. 350. 352. 1. Lutw. 490. 565.

Case 117. Timber *against* Gardiner.

Assumpsit. Action upon the case.

ACTION UPON THE CASE for several promises; the defendant pleads, that he gave the plaintiff such a quantity of, &c. and the plaintiff accepted it in full satisfaction of the said promises; the plaintiff demurs; and defendant joins in demurrer.

IT WAS INSISTED *for the plaintiff*, that the defendant's plea was naught, because it was not said that the defendant gave it in satisfaction. 5. *Co. Rep.* 117.

THE

THE COURT. If the defendant gave it with one intention, and the plaintiff accepted it with another, the intention of the donor must prevail; but the question here is, Whether the words "full satisfaction" shall not as well relate to the verb "give," as the verb "accept;" especially because of the conjunction "*et*," which seems to difference it from the case mentioned? TIMBER *against* GARDINER.

Adjournatur.

*[225]

* Shiply *against* Shiply.

Case 118.

Writ of dower.

A WRIT OF DOWER was brought in the court of common pleas. The defendant pleaded, as to all the lands lying in the vill of *B.* *a bar* by reason of *a fine levied*; and as to all the lands lying in the vill of *C.* besides twenty-four acres, *a bar* by *release*; and as to those twenty-four acres in *C.* the defendant pleaded *non-tenure.* The demandant in her replication admitted, that as to all the acres besides the twenty-four acres, *the fine* and *the release* are sufficient bars, and joins issue upon the *non-tenure.* A verdict was found for the demandant, and judgment was given for the demandant as to the twenty-four acres; and as to the rest, the judgment was, that the demandant "*pro falso clamore suo sit inde in misericordiâ,* &c. and that the defendant *eat inde sine die,* &c." On a writ of error being brought on this judgment in the court of king's bench,

IT WAS INSISTED, that the judgment itself was erroneous for want of a *nil capiat per breve*; and for this was cited 8. *Co. Rep.* 62. *Co. Entries,* 320. 323. 326. *Cro. Jac.* 284.

IT WAS URGED by the Counsel for the defendant in error, in answer to this, that if this were a good cause to reverse the judgment, it would shake the authority of a thousand judgments; the cases being endless where the words "*nil capiat per breve*" are omitted (*a*). And then insisted upon, that if this were a fault, it would be aided by 16. & 17. *Car.* 2. c. 8. where are these words, "and all other matters of like nature."

THE COURT. The utmost consequence of this objection is, that we must give the same judgment that the court of common pleas ought to have done. Salk. 262. 402.

*IT WAS OBJECTED by the Counsel for the defendant in error, that the writ of error was so general and uncertain, that the Court could not say the record was before them; for there being several sorts of dower, and this writ of error being only *dotis* generally, it was uncertain what record the writ of error was to remove. *[226]

(*a*) Townsend's First Book of Judgments, 53, 54. Co. Ent. 657. Rastal's Ent. 654. 677.

IT

Shirly against Shirly.

It was objected likewise, that the writ of error should have set forth the vill *(a)*.

But these objections were over-ruled, as being of that nature as if it was necessary for the whole declaration to be set forth in the writ of error. In debt, though there are several sorts of debt, the writ of error is *de placito debiti*, without saying more, whether bond, &c. *(b)*. So in trespass, the writ of error is *de placito transgress.* and yet several trespasses.

Abridgment dower.

The principal point insisted upon for the plaintiff in error was, the want of abridgment. It was said, that if the lands out of which dower was demanded had been all in one vill, and it had appeared by the demandant's own confession, that the demandant had made too large a demand, in that case the demandant ought to abridge her own demand; but if the land lie in two vills, then this abridgment is not permitted; but the writ must abate for making too large a demand. But granting that an abridgment of the demand may be permitted, where land lies in two vills, as *Fitzherbert (c)* seems to allow, yet the judgment was erroneous, because here is no abridgment *(d)*.

The judgment given in the court of common pleas was affirmed *nisi*; and the *Earl of Clanrickard's Case (e)* relied upon, as a case in point.

(a) Co. Ent. 248.
(b) 2 Saund. 43. 328.
(c) Fitz. Abr. "Plaint" pl. 17.
(d) The following authorities were quoted: The Year-Books 9. *Hen.* 6. 43. a. 14. *Hen.* 6. fo. 3. 19. *Hen.* 6. pl. 13. 7. *Edw.* 3 fo. 10. Rastal, 232. & 234. c. and Robinson's Entries, 281.
(e) Hob. 273.

*[227]

Case 119.

* The African Company *against* Mason.

In debt on bond, the plaintiff can only assign a single breach of the condition.

1. C. Gilb. 238.
1. Stra. 227.
2. Burr. 773.

Debt upon bond: Upon *oyer* of the bond the condition of it appeared to be, that *Mason* should be factor for the Company at *Bristol*, and should behave himself faithfully in that and all affairs he should be employed in by the Company; and should, when required, pay to the use of the Company all the sums of money in his hands and in his possession, received by him for the Company.

The defendant pleaded performance of the condition generally.

The plaintiff in his replication assigned for breach, that the defendant, after the making of the said bond, and before the bringing of the action, did at *London* receive of *Jacob Reynolds* and divers others, for the use of the Company, several sums of money to the value of three hundred and seventy-six pounds, and that he was requested to pay this money, and had not paid it.

The defendant demurred.

It was objected to the replication:

First,

The African Company against Mason.

First, That to say the defendant received several sums of *Jacob Reynolds* and others to the value of three hundred and seventy-six pounds, was uncertain and double. Indeed in covenant, because the party is to recover damages in proportion to the damages assigned by the breach, and to prevent prolixity, such a way of pleading is permitted; but not in a bond, because if the plaintiff had assigned but one particular sum, how small soever, the whole penalty of the bond is forfeited (*a*).

Secondly, That the replication was not within the condition of the bond; for the receipt was by the condition to be at *Bristol*, and the receiving was in the replication set forth to be at *London*, and not said to be received upon account of the affair of *Bristol*.

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* Thirdly, That it is not set forth in the breach, that the money, when demanded, was in his hands and possession.

Fourthly, That it is not said, that he was employed to receive the money.

It was insisted *for the plaintiff*, that the breach was well assigned; for in breaches of a complicated nature, such a general kind of assignment is allowed (*b*). Anciently no allowance was made to avoid prolixity in pleading, and therefore *performance generally* was not allowed; but this was altered in *Queen Elizabeth's* time, where pleading as general as this was allowed (*c*). The breach assigned is single; for the not paying when required is the breach, the receiving, &c. but matter of inducement.

The plaintiff perceiving the opinion of the Court to be strongly against him, especially upon the first and third objections, obtained leave to *discontinue*, upon the payment of costs (*d*).

(*a*) Brigstock *v.* Stannion, 8. *Will.* 3. in the common pleas. [illegible]

(*b*) 1. Lev. 94. Lut. Ent. 580. Chambers *v.* Priestland, Mich. Term, 4. *Ann.*

(*c*) Cro. Eliz. 253. 749. 916.

(*d*) See Stiles *v.* Clough, 1. Stra. 227. Cornwallis *v.* Saverey, 2. Burr. 772. Jones *v.* Williams, Dougl. [illegible] Bache *v.* Proctor, Dougl. 3[illegible]

Muston *against* Yateman.

Case 120.

To trespass, *Qu.* Whether a justification stating that *A.* was *seised* of the place where and demised it to the defendant, without stating of what *estate* he was seised, is good, after issue on a replication *de injuria, &c.* and verdict for the defendant.—S. C. post. 300. S. C. Gilb. 305.

This was an action of trespass.—The defendant pleaded, that *Sir Thomas Freke* was *seised* of a place called *Ten Acres*, and demised the same to the defendant for ninety-nine years; and that *Sir Thomas Freke*, and all those whose estate he had, did time out of mind use such a way, &c.

The plaintiff replied "*de injuriâ suâ propriâ* absque hoc "*quòd prædictus* Thomas Freke, and all those whose estate he "had, did time out of mind, &c."

MELTON *against* YATEMAN.

Upon this issue joined, and jury find that *Sir Thomas Freke*, * and all those whose estate he had, did time out of mind, &c.

[229] IT WAS MOVED *in arrest of judgment*, that the justification was naught, because it was *seisitus* generally, and the estate not set forth of which he was seised, whether life, tail, or fee; and that therefore, since every man's plea is to be taken in that sense that is most prejudicial to the pleader (because in law a man is always presumed to make the best of his own case), by *seisitus* here must be intended a seisin for life, which will not support prescription.

Hob. 234. 242. This objection was also turned another way, *viz.* that this plea was naught for the uncertainty; it might be a seisin for life, tail, or in fee.

IT WAS URGED *in support of the plea*, that the jury could not possibly have found the verdict they gave, unless it had been a seisin in fee; and several cases were quoted (*a*) to shew, that a verdict cures all defects where it was possible for the verdict to have been given, unless that had appeared which was wanting in the pleading.

PARKER, *Chief Justice.* It must have been given in evidence that he was seised in fee; for he who has an estate only for life, has nobody's estate but his own; and then it was impossible for the jury to find, as they have done, *viz.* "That *Sir Thomas Freke*, "and all those whose estate he had, did, &c.

EYRE, *Justice.* "Seised *de feodo*," is always the form of pleading; and therefore necessary. Whether the verdict has cured it I cannot say.

[230] * POWYS *junior.* Prescription for the way is the only matter in issue; the seisin is only inducement, and passed over at *nisi prius.*

PARKER, *Chief Justice.* The only question is, Whether the issue be a material issue? for if it be, then by the express words of the act, all defects in pleading are cured by the verdict.

Adjournatur (*b*).

(*a*) Hutton, 254. T. Jones, 732. Raym. 487. 1. Lev. 308.

(*b*) This case was argued again in Easter Term, the 1. *Geo.* 1. *post.* 300. But it does not appear in any of the reports of this case what judgment was given. S. C. Gilb. Rep. 307. See Cary *v.* Holt, 2. Stra. 1233. Helwis *v.* Lamb, Salk. 453.

EASTER TERM,

The Thirteenth of Queen Anne,

IN

The House of Lords.

Roper *against* Radcliffe. Case 121.

JOHN ROPER being seised in fee of lands in *Cornwall*, *Gloucester*, and *Monmouth*, did by lease and release convey the premises to *William Constable*, *Richard Snow*, and *Daniel Hickman*, and their heirs, in trust to sell the same, and out of the purchase money, and rents, until sale, to pay a debt of four thousand pounds, due to *Elizabeth* and *Hesther Walden*, by mortgage of the premises, with interest; then in trust for the payment of debts mentioned in a schedule, to the deed annexed; and the overplus of the money so to be raised, to be paid as the said *John Roper* by any writing attested, or by his will, should appoint; and for want of such appointment, in trust for the benefit of the said *John Roper* and his heirs. This deed bore date the eighteenth of *January* 1708. On the fifth of *March* 1708, the said *John Roper* made his will, reciting the said lease and release, and the power reserved to him, in the surplus of the said real estate, and bequeathed several pecuniary legacies in the will mentioned to his relations, and the residue of * all his real and personal estate he gave to the respondents *William Constable* and *Thomas Radcliffe*, to *Robert Hewit* and *Daniel Hickman*, and to their heirs and assigns for ever. On the first day of *April* 1709, the said *Roper* added a codicil to his will, and thereby gave the several further legacies therein mentioned, and all the remainder, whether in lands or personal estate, he gave to his executors, the respondents *Radcliffe* and *Constable*, and soon after died.

If a *Roman* Catholic convey his estate in trust to be sold for the payment of a mortgage, and discharge of his debts, and the residue to be paid as he should by his will direct; a devise of the residue to *a papist* is void by the statute 11. & 12. *Will.* 3. c.
S. C. ante, 89.
S. C. 9. Mod. 167. 181.
S. C. 2. Eq. Abr. 508. 592. 620. 771.
S. C. 1. Bro. P. C. 450.
S. C. 1. Stra. 267.

* [231]

THE RESPONDENTS *Thomas Radcliffe* and *William Constable* brought their bill in chancery against the appellant, and also against the said *Hickman*, *Hewit*, *Snow* and others, to have the trust-estate sold, and for an account of profits, and after the debts and legacies paid, to have the surplus money arising by sale, equally divided between the respondents, according to the codicil.

THE

ROPER against RADCLIFFE.

THE APPELLANT put in his answer, insisting that he was heir at law to the testator, and intitled to all such real estate as was undisposed of by him; and that the respondents *Radcliffe* and *Constable* are, and at the time of the testator's decease were *papists*, and as such, the appellant was advised, that by virtue of an act in 11. & 12. *Will.* 3. made for the preventing the growth of popery (*a*), the respondents were rendered "incapable of purchasing "in their own names, or the names of any other persons, to their "use, or in trust for them, any manors, lands, profits out of lands, "tenements, rents, terms or hereditaments, and that all and singular estates, terms, and any other interests or profits whatsoever "out of lands, to be made, suffered, or done, to or for the use or "behoof of any such person or persons, or upon any trust or confidence, mediately or immediately, to or for the benefit or relief "of any such person or persons, shall be utterly void, &c." and that all interests or profits made out of lands to the use of the respondents were void.

* [232] * And the appellant being heir at law, and a protestant, claimed the benefit of the said estate, and insisted that he was intitled to the said *John Roper's* real estate not sufficiently devised or conveyed by him, subject to such incumbrances as he *bona fide* had charged thereon, and by law was capable of doing, and demanded the judgment of the Court, Whether he should be decreed to join in the sale.

Robert Hewit and *Daniel Hickman* insisted by their answer, that the real estate devised by the said will ought to be considered, as to the remaining part of the testator's lands, after a sufficient part sold for the payment of debts and legacies, as land, and not as personal estate; and that so much only ought to be sold as would be sufficient to pay the debts; and in case the respondents were incapable of taking, then the said *Hewit* and *Hickman*, the protestant executors, claimed the estate, as being the only devisees capable to take the same; and insisted, that the codicil, with reference to the devise of the remainder of the testator's lands, did not controul the devise thereof, mentioned in the will; for that, if the respondents were incapable to take the lands as purchasers by the devise, they were to be esteemed as persons not *in esse*; and that the codicil in such case, as to the devise of the said lands, was void in law.

HARCOURT, *Lord Chancellor*, at the pressing instance of the appellant's Counsel, called in to his assistance PARKER, *Chief Justice* of the court of king's bench; *Chief Justice* TREVOR of the court of common pleas; POWELL, *Judge* of the court of king's bench; and SIR JOHN TREVOR, *Master of the Rolls*.

And a case was made by consent, consisting of three queries:

(*a*) But see the statute 18. *Geo.* 3. c. 60.

FIRST,

FIRST, Whether a papist can convey his land by deed to trustees, to be sold for the payment of debts and legacies, the surplus of the money to go to papists? Ro[illegible] against RADCLI[illegible]

SECONDLY, Whether he may do this by will?

* THIRDLY, Whether a papist is disabled by this act of parliament from taking land by devise? * [233]

Upon argument before the Lord Chancellor and these Judges, IT WAS RESOLVED by the consent of all but PARKER, *Chief Justice*, that the devise of the surplus-money "after debts and legacies paid" to the respondents *Constable* and *Radcliffe*, was a good devise, notwithstanding the said statute for disabling papists from purchasing lands; the surplus-money being a personal interest in them, and therefore not made void, either by the words or by the intention of that act.

As to *Hewit* and *Hickman* (who had brought their cross-bill) they were dismissed without costs; THE COURT being of opinion, that the codicil, whereby the testator gives his remainder, whether in lands or personal estate, to the respondents *Radcliffe* and *Constable*, was a revocation of the devise in his will, of the residue of his personal and real estate, to *Constable*, *Radcliffe*, *Hewit*, and *Hickman*; even supposing the persons named in the codicil were disabled by the act.

From this decree an appeal was brought in THE HOUSE OF LORDS.

It was argued for the appellant by SIR JOSEPH JEKYLL and MR. LECHMERE, and for the respondents by SIR ROBERT RAYMOND, *Solicitor General*, and *Serjeant* PRATT.

N. B. The latter part of the decree, as to the revocation, was not controverted in the house of lords, but approved of by the Counsel of both sides, as good law.

THE THIRD QUESTION was spoken to first, *viz.* Whether by this act of parliament, *a papist* was not excluded from taking land by devise?

IT WAS INSISTED *for the appellant* that he was; for otherwise the intent of the act would be quite overthrown, which was most certainly to prevent papists from making new acquisitions. * And it is absurd to imagine that the law-makers should restrain papists from purchasing estates, when they are to pay a valuable consideration; and leave it free for them to take land by devise, where they are to pay nothing for it. There is no one word in the law, of a more determined and fixed signification than "purchase;" for it will not be controverted, but that the word "purchase" stands by law opposed to descent; and whoever does not come to land by descent, is, in the language of the law, said to take by purchase. Legislators are presumed to speak the language of the law. A papist incapable of taking land by devise. * [234]

ROPER *against* RADCLIFFE.

8. Mod 177. 201, 202.

They certainly who make laws, must know what the legal import of words is; and therefore acts of parliament are to be understood in a legal sense, unless the subject matter of the act apparently hinders it. So in the *Statute of Mortmain*, it has been held, that the clause whereby a licence is given to purchase lands, includes taking by devise.

Lands devised to be sold for payment of debts and legacies, surplus to a papist, this surplus in nature of a real interest, and as such void by stat 11 & 12 *Will* 3

THE OTHER TWO QUESTIONS were resolved into one, *viz.* Whether the interest that was given by the will and codicil, was such an interest as *a papist* was restrained by the act from taking? For to state the case, whether a papist be incapacitated by the act to take the overplus, is to narrow it too much. The disability is to be considered as it stands at the time of the death of the testator, and not at a future time, *viz.* the sale of the land. That the act of parliament designed to prevent papists from taking equitable interests, as well as legal ones, is so very plain from the words of the act, that it can admit of no dispute. And, indeed, unless the act of parliament had done this, it had done nothing at all, since the use of trusts is become so general and universal, and there is

*[235]

as sure a * remedy for a breach of trust in chancery, as for any legal right in a court of law. It is objected, that the end of the act of parliament is plainly to oblige papists to turn their real estate into personal; and therefore here being a provision for the sale of the land, by positive words in the deed of trust, the end of the law is satisfied. the answer is, that if the meaning of the act is to be discovered from the words of it, it means this and more, *viz.* that *Roman* Catholicks should have no handle, no influence over, or interest in the estate, so much as for an hour. For all this decree, the estate may be continued on, and the land never sold; and until the land is sold, the profits of the land belong to *Radcliffe.* If any advances have in fact been made towards a sale, this may be wholly owing to the disturbance this suit has given them. Who is there that will disturb them in the enjoyment of the land, and inforce this part of the decree that relates to the sale? since nothing can be got by it, but only obliging a papist to turn a real estate into a personal one. There is a case now depending in the court of chancery, wherein the conveyance is settled according to this precedent, with this variation only, that the trustees are there impowered to sell whenever they think convenient. *Vane v. Fletcher.* Positive directions to trustees to sell, do not oblige them to sell; and they are never blamed by a court of equity for not selling, as long as *cestuy que trust* enjoys the profits, and as long as his interest does not require a sale. *Radcliffe*, according to the decree, is in effect to have the profits even before sale; for since they are to be applied to the payment of debts, the *residuum* will

*[236]

Hereditament, what.

9. Mod. 189.

consequently be the larger. * "Hereditament" is one of the words of the act; and this imports any thing that is descendible from ancestor to heir. In the *Earl of Meath's Case*, 1692, that went up to the house of lords, a daughter being to have such an interest as money arising from the sale of land, it was esteemed such an heir-

ship

ship as would give her the same privilege that an heir had. If such an interpretation be offered to be put upon an act of parliament, made *pro bono publico*, as will make the act void, that is reason enough to reject it. If it be objected, that the church was by the *Statute De Religiosis* disabled from taking lands by any manner of conveyance, and thereupon this evasion was found out, and suffered to take place, *viz.* the church brought their action for such land as they had a mind to purchase, and judgment was suffered to go by default, and this was held unanimously to be out of the statute; and yet this an act made *pro bono publico*, and the intent of it as plainly eluded, as here it can possibly be; the answer is, that this resolution stood upon a particular maxim of law, viz. *Judicium redditur in invitum*, and therefore the law will never presume a fraud; but no judgment in the present case. If it be said, that by this means a papist will be incapacitated to pay his debts; the answer is, that we are not bound to account for all accidents that may possibly happen. Suppose the will out of the case, and that it had stood intirely upon the deed of trust, Must not the trust have attended the inheritance? Would not *Mr. Roper's* widow have had a claim to dower out of it? or, Would not there, *mutatis mutandis*, have been a tenant by courtesy out of such an estate? If this be so, then undoubtedly it is a real estate; for it is the course of succession, and the law of descent, that is the * true characteristic of, and which constitutes the proper difference between real and personal estates. This is so true, that an annuity is the only personal interest, that can be thought of, which is descendible to the heir. Nor is there anything in the will to turn this into a personal interest. On the contrary, we find the testator himself in his will (which shews what he thought of it) calling it real estate. Nor was this an expression that fell from him by chance; for though it is indeed true, that in the codicil he varies his expression, yet he makes use of one that does more emphatically import the same thing, *viz.* land; his words are, "and all the remainder, whether in lands or in personal estate." That the death of the testator is the only proper time to consider, whether this interest was a real or personal one, appears plainly from hence, that this will would not be a disposition of it, unless attested with three witnesses, and duly executed according to the statute of Frauds and Perjuries. A devisee stands in the place of the testator, and cannot take any other estate than what it was at the time the will took place, *viz.* the death of the testator. Upon the death of the respondents, supposing them capable, the *residuum* would go to their heirs. If land be conveyed to trustees, to be sold for the payment of debts, remainder to their heirs, is not this remainder the very reversion and estate? The addition of the power to sell makes no alteration in the interest; it does not imply a necessity to sell, but only a power to do it upon occasion. The selling, or not selling, remains intirely in the power of the trustees, and the *cestuy que trust*. The heir can compel a conveyance in chancery upon payment of the debts; nay, he may determine what

Roper *v.* Radcliffe.

2. Inst. 459.

*[237]

Roper against Ratcliffe.

part of the land the trustees shall sell. Upon the whole, this plainly appears to be such an interest as carries along with it all the authority, power, and influence of the land, which the act most certainly designed to prevent. If land be appointed to be sold for the payment of debts, the heir is intitled to the surplus-money, though no directions about it. If a mortgagee sell, the surplus-money is to be answered to the heir at law, and not to the executor. This is an estate devised for the behoof and benefit of a *Roman* Catholick; because he is to have the surplus, the *quantum* is not material. Land in its own nature, means land between protestants; but it must be personal estate only to elude the act. At the instant the testator died the right accrued, and therefore the incapacity must then attach, and likewise the interest then vested in *Mr. Roper*; and the turning it afterwards into money will not devest an interest already vested in the heir at law. To interpret a law so that the letter shall remain but the end be defeated, is in effect to assume a legislative power. Every *Roman* Catholick will be instructed in an easy way how to elude and frustrate this act of parliament. It is but contracting a debt, or giving a legacy; it may be done by deed as well as by will; for if this surplus be to be considered as personal interest, they are not disabled from conveying a personal interest. They may convey without consideration, if they conceal it; nay it cannot be discovered, for a bill would not lie in equity for this purpose, because the discovery would induce a forfeiture.

ARGUMENT *for the respondents.* The word "purchase," in the vulgar and common acceptation of it, does not import devise. The word "purchase" is, in *Littleton's Tenures*, defined to be
[239] "the possession * of land that a man comes to by his own act;" a definition not applicable to devise. Papists may come to land by descent notwithstanding this act, and therefore why not by devise; unless the legislators thought fit to prevent it. There are two rules to be observed in the interpretation of statutes. First, such an interpretation must be made as will support the intention of the act. Secondly, Such an interpretation must be made as will make the whole consistent with itself. The general intention of this act was by gentle and easy methods to bring papists to conformity, and to prevent the increase of their landed interest; and therefore the first clause expressly provides, that the incapacity of the ancestor shall not descend upon his posterity; and whensoever the person disabled conforms, the disability is gone. If an heir be under the age of eighteen at the time of the descent, he is disabled by the act from taking the estate, unless within such a time he conform, &c. whereas a person over that age may take by descent or devise, without any restriction at all; the reason of which difference was possibly this: The legislators looked upon persons under the age of eighteen to be so young that they were capable of any impression, and might be easily made protestants; whereas from that age and onwards, they would be so riveted and con-

firmed

firmed in their prejudices, that their conversion must be esteemed as next to an impossibility. Now if the word "purchase" in the latter clause, be extended to take in devise, the latter clause will in many respects be repugnant and contradictory to the former. For whereas by the former clause, a person under the age of eighteen, on the twenty-ninth of *September* 1700, may take by devise, if within six months after he attains that age he takes the oaths, &c. the latter clause * thus interpreted makes such a person absolutely incapable. By the former clause, though such person should not within six months, &c. yet whenever he does conform, the incapacity is removed, and the devise shall take place; whereas by the latter thus expounded, he shall not. The word "purchase" therefore cannot be interpreted to include devise, without making the act contradict itself. The word "such" is tied down to "purchase," and penal laws are never extended. A thing that is to be done must be looked upon as done. It is in the power of the trustees, immediately upon the death of the devisor, to sell the land. As to the objection, that it appeared from the decree that the profits of the land, until sale, did in effect go to *Radcliffe*, since the application of them to the discharge of the debts must increase the surplus; it may be answered, that the surplus would be more increased by having the land sold immediately, the interest of the money arising from the sale much exceeding the profits of the land. Though a court of equity will, at the desire of the heir, or residuary legatee, decree them the land, yet it will not do this in spite of their teeth. Such a surplus is liable to pay debts upon simple contract, which land is not. If this surplus be personal estate in itself, the word "real" in the will, cannot alter or change the nature of the estate. There is no difference, whether the money arises from the sale of land, or any other way, as long as it is money. The surplus of the money arising from the sale of the land, is what is devised, and what the respondents have by their bill demanded as soon as they could. * The election that a court of equity gives the heir, or residuary legatee, to have either the money or land, is a consequence of his being intitled to the surplus-money; and therefore to what purpose can it serve for the land to be sold, if he will take upon him the discharge of debts and legacies, and desire to have the land? Now therefore, since a court of equity gives this election in favour of the heir or residuary legatee, it is strange to suppose, that in the present case a court of equity should take this election away, and refuse to decree him the money, when by his bill he desires it; only because, by act of parliament, he is incapacitated to take the land.

Roper *against* Radcliffe.

* [240]

* [241]

As to the objection, that at the time of the conveyance it is real estate; it may be answered, that the reason why the land, if not sold before the death of the ancestor, shall descend to the heir at law, or pass to the residuary legatee, is, because it is at his election to choose either land or money; but here the heir, or residuary legatee, had no such election, which alters the case. The

Rosse against Radcliffe.

Chancery could not have decreed a papist the land though he had desired it; should it have done so, the decree would have been void.

As to the objection, that the land may not be sold, the answer is, that the trustees by not selling will be guilty of a breach of trust; and as a breach of trust is never to be presumed, that cannot authorize a different interpretation. By "profits out of lands," must be understood continuing profits, and not money arising from sale.

IT WAS REPLIED *for the appellant*, that the respondents preferring their bill in equity very speedily, and claiming this as personal estate, is not * at all to the purpose; for they were not obliged to have done it at all. As to the definition of the word "purchase," it will extend to devise, for to that the agreement of the devisee is necessary, which is an act. *Co. Lit.* 10. *a.* speaking of the several conveyances of purchases, uses the word in our sense. As to what was said, that to include "devise" under the word "purchase" in the latter clause, would make one part of the act of parliament contradict the other, it may be answered, No; for a general subsequent clause may be restrained by a precedent one. The rule that penal laws are not to be interpreted by equity, holds in cases of laws that are penal upon particular persons, but not where laws are made for the public good, and the peace and safety of the realm; which is the case here.

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Ante, 117.

As for the objection framed from the *Statute De Religiosis*, the true answer is, that the power of the church was so very great in those days, as might probably have an influence upon the proceedings of WESTMINSTER-HALL; but it is to be hoped now, that there will be no partiality in favour of papists, and in prejudice of a protestant heir. Property will be very precarious, if a court of chancery can at pleasure call a real estate a personal one, or a personal a real one.

THE JUDGES being summoned to attend and give their opinions, were divided, six against five; six for reversing, and five for affirming the decree. Had LORD TREVOR been there, and stuck to his former opinion, there had been six against six.

THE DECREE was reversed by a great majority of *the Peers* (*a*).

(*a*) See the case of Cornish *v.* Ewington, 2. Peer. Wms. 363.

TRINITY

TRINITY TERM,

The Thirteenth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir Thomas Powys, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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* [243]

* Miles *against* Williams. Case 122.

DEBT UPON BOND was brought against the defendant and his wife: They pleaded in bar, that the bond was entered into by the wife *dum sola*; that a commission of bankruptcy issued out against the husband, who in all points conformed himself to the statute 4. *Ann.* c. 17. s. 7. and so both defendants say, *quòd vigore* of the statute 4. *Ann.* c. 17. s. 7. and other statutes, he became a bankrupt, *per quod* the debt was discharged; *et hoc parati sunt verificare.*

A bond given by the wife *dum sola* is discharged by the bankruptcy of her husband; but if the bankruptcy be pleaded to an action against them on such bond, the plea must conclude to *the country*, and not with a *verification*, or it will be bad on a *special demurrer*.

To this plea the plaintiff demurs specially: because a bond entered into by the wife *dum sola fuit*, is not discharged by the bankruptcy of the husband; and because they ought to have concluded their plea to *the country.*

* PARKER, *Chief Justice*, delivered the resolution of the Court, that such a debt was a debt within the statute 4. *Ann.* c. 17. s. 7. and consequently that it was discharged by the bankruptcy of the husband. The words of the statute are, "shall be discharged from "all debts by him, her, or them due and owing at the time that he, "she, or they did become bankrupt." The question therefore will be, Whether this be a debt due and owing at the time of the bank-

S. C. ante, 160.
S. C. 1. Peer. Wms. 249.
S. C. Gilb. 318.

* [244]

O 4 ruptcy?

Master Williams.

ruptcy? It has been argued by the bar, and very reasonably, that if debts due to the bankrupt's wife are assignable by the commissioners, then it is reasonable that debts owing by the bankrupt's wife should be discharged by the bankruptcy. Now in order to know whether a debt due to the wife of the bankrupt be assignable, the intention of the statute 13. *Eliz.* c. 7. and 1. *Jac.* c. 15. must be considered. By the 1. *Jac.* 1 c. 15. which is explanatory of that of 13. *Eliz.* c. 7. it is provided, "that the commissioners "shall have power to grant and assign, or otherwise to order or "dispose all debts due or to be due, to and for the benefit of the "bankrupt, by what person or persons soever, or in what manner "and form soever, to the use of the creditors, &c. and that the "said assignment or disposition, &c. shall so vest the property, &c. "in the assignees as fully, &c. as if the said bill, bond, &c. where-"upon the said debts shall arise and grow, had been made to, or with, "or for the assignees." Now the intention of this act of parliament is plainly this, that the bankrupt being not thought a proper person to be intrusted with the management of his own estate, for fear he should defraud his creditors, the act puts the commissioners in the place and stead of the bankrupt, and consequently whatever estate

[245] the husband can turn into money, in order to pay * his debts, the same is assignable by the commissioners. The best way of interpreting statutes, is by the rules of common law in like cases. Thus the statute *De Donis*, which says, "that a fine levied of en-"tailed lands shall be *ipso jure nullus*," has been interpreted (*a*) not to make *a nullity*, but *a discontinuance*; because at the common law, if a bishop seised in right of his church, or a husband of his wife, had aliened by fine, &c. it was but a discontinuance. If a bond be entered into to two, and one grants the bond to the king, the king may sue alone (*b*). It is the constant practice in outlawry to seize all the debts due to the wife, and yet the words of the writ "*bona et catalla terras et tenementa* of the person out-"lawed," are rather weaker than the words of the statute. The case of *Breadmdn v. Coales* (*c*) is a strong case; for it proves that the husband may assign a debt due to his wife, by the common law; and that he was not restrained by the statute 7. *Jac.* 1. c. 15. "because," says the book, "it was the husband's own debt," which brings it within the very words of the fourth of the Queen. It is certainly a very equitable interpretation, that whatever may be applied by the bankrupt to the payment of debts, may be assignable by the commissioners. The contrary opinion, that it is not assignable, promotes no good end in the world. To the objection, that the statute does not extend to debts due to the bankrupt as administrator or executor, it may be answered, that it is nothing to the purpose, for he has no interest in those debts to his own use,

[246] and when he recovers them they are assets, &c. * But it is objected, that this statute extends not to debts due to him and ano-

(*a*) 3. Co. 85.
(*b*) Year-Book 21. *Hen.* 7 fo. 15.
(*c*) Hob. 253.

ther

ther; and for this purpose 1. *Levinz*, 17. is quoted. To this I answer, that there is no judgment in that case, and that I doubt whether it be certain, that the whole debt is not vested in the crown, upon the outlawry of one, where there are two obligees. That a debt due from the bankrupt and another is within the act, appears from the statute 10. *Ann.* c. 5. a declaratory law: but this is his debt, as he is one with his wife. Another objection has been taken, that this debt shall survive to the wife if the husband die before he recover it, and this construction will deprive her of this contingency; but the answer is, that the husband might by his release have discharged this debt; now this is a discharge of the legislature, applied in case of his debts. The assignee has the same remedy to recover it, that the bankrupt himself had. If a note be payable to a *feme sole*, or order, and she afterwards marries, her husband is the proper person to indorse this note. Now, that this debt due from the wife is discharged by the bankruptcy, seems to me to be clearer than that a debt to the wife should be assignable, &c. for this construction makes for the benefit and interest of the bankrupt, the creditors, and the wife. As to the bankrupt, nothing can be harder than that he should be stripped of every thing, forced upon oath, and at the peril of felony, to make a full discovery, and yet after all, not to be discharged. It is the intention of the *capias*, only, that the love of liberty should oblige to a full discovery. * The discharge of the bankrupt stands upon this reason, that he is stripped of every thing that should enable him to pay. This reason holds equally to all the debts for which he may be sued. This exposition is better likewise for the creditors; for if this debt be discharged, then is a creditor of the wife a creditor within the statute, and to come in for an equal proportion; which is far more eligible than an action, which is good for nothing unless the wife survive, and perhaps not then neither. As to the wife, that this exposition is beneficial to her, is so plain, that it has been urged as an objection that it will be too beneficial. Whether this be a temporary discharge during the coverture, or a perpetual one, is not now a question; but I am inclined to think it a perpetual one: nor is this unreasonable, for the law looks upon the debt as paid, since the creditor is let into the common fund. As to the objection, that this may be a fortune to a woman; it is very reasonable, that she should share in the advantages as well as disadvantages of the bankruptcy. If a supposition be made, that a woman may, precedent to her marriage, put her estate into the hands of trustees, for her separate maintenance, and so her debts will be discharged by the bankruptcy, and her estate out of the reach of the creditors; the answer is, No; for I am of opinion that such a settlement or conveyance, *quoad* the creditors, shall be deemed void and fraudulent. As to the objection, that this discharge is a personal privilege, and therefore not communicable to the wife, the answer is, that her discharge is necessarily consequential upon his (*a*).

Miles *against* Williams

* [247]

(*a*) See Bosvil *v.* Brander, 1. Peer. Wms. 460. Saddlington *v.* Kinsman, 1. Bro. C. C. 44.

THE

Miles against Williams.

The Court was unanimously of opinion, on the second point, that the plea of the defendants in bar was naught * for not concluding to *the country*; and therefore, this being specially assigned for cause of demurrer,

Judgment was given for the plaintiff.

Case 123. The Queen *against* Simpson.

In an information on a penal statute, it is sufficient to lay the offence as committed between *such a time and such a time.*

THIS was a conviction of *deer-stealing*, before justices of the peace, upon the statute 3. & 4. *Will. & Mary*, c. 10. (a).

The exceptions taken were:

First, That no certain time was laid for the commission of the offence, but only that between such a time and such a time the defendant did steal *unum cervum.*

* [249]

* In answer it was said, that it had been taken in the case of *The King v. Chandler* (b), and there over-ruled; and that it was the constant course of informations, in the court of exchequer, to set forth the time in the manner it is here done.

An information must shew that the party was summoned.

Secondly, That the conviction was behind his back, and without hearing him. Indeed he was summoned, but the act gives no manner of authority to proceed by way of summons.

To this exception it was answered, that no way of proceeding whatsoever was directed by the act; that therefore the act being silent in this point, it must be left to the discretion of the justices; and that the way of proceeding by summons, was a way very consonant to reason and justice, inasmuch as it gives the defendant time and opportunity to make his defence; that the want of summons has been objected even in cases upon acts of parliament, that did not direct the proceedings to be by way of summons; as in the case of *The Queen v. Peach* (c). This was inforced by precedents, where, upon this very act of parliament, the proceedings had been by summons.

A summons to appear at *B.* is sufficient.

Thirdly, The summons is insufficient, supposing the justices could proceed in that way; for he is summoned to appear at *Bolton*, which must be understood to be *a vill*; and then how should the defendant know the house where the justices will be?

To this exception taken against the summons itself, *viz.* the uncertainty of the time and place, when and where the defendant was summoned to appear, it was answered, that this objection supposes very great absurdities; as first, that the defendant cannot find the justice out; secondly, that the justice should come at an unreasonable hour, &c.

(a) See 16 Geo. 3. c. 30. and 1. vol. Hawk. P. C. 7th edit. page 371 to 372.

(b) Ld. Raym. 581. Salk. 378. See also 10. Mod. 245. and Boscawen on Convictions, 23, 24.

(c) See Rex v. Venables, Ld. Ray. 1405. Stra. 630. Rex v. Dyer, Salk. 181. Boscawen on Conv. 53 to 57.

Fourthly,

FOURTHLY, It is to appear such a day, but not what time of the day. Perhaps the justices came at five o'clock in the morning, and the defendant not being there then, was convicted, though he came afterwards. The summons need not specify the time of day.

To this exception it was answered, that the return, which must be taken for true, is an answer to the objection. For the return is, that the defendant *licet debite summonitus ad hoc tempus et locum locum*, did not appear; so that at whatever time or place he was convicted, it must be now taken for true, that he was summoned to appear at that time and place.

FIFTHLY, Though in the information the offence may be said to be committed between such a time and such a time, yet the proof ought to be certain. Now the oath is no more, than that the defendant did, within such a time and such a time, steal *unum cervum*; so that the time is left as uncertain in the evidence as in the information; and then *non constat* that the evidence relates to the same deer; it should have been *cervum in informatione prædict. mentionat.* What evidence is sufficient in a penal information.

As to this objection, *viz.* want of certainty in the proof, it was answered, that it was next to impossible for the witness to be able to swear to the very * day, and it is not to be intended that there were more deer stolen than one. * [250]

PARKER, *Chief Justice* It is more agreeable to the course of the common law that he should be summoned. There is nothing in the objection as to the evidence. Time must be taken to look into the precedents.

EYRE, *Justice*. As to the objection, that the time should have been set forth with more certainty, than that "between such a time and such "a time, &c." that has been sufficiently settled in *Chandler's Case* (a) to be well enough. It is true, that the *ad hoc tempus et hunc locum* cannot be confined to a particular hour or place; but then it is not to be supposed but that a magistrate will administer justice with integrity; and it is the duty of the party summoned to attend his time and place. In informations and indictments, no judgment can be given, unless the defendant appears. The defendant may indeed have judgment of outlawry passed against him; but that is for his contempt in not appearing. And if the Judges of superior courts cannot proceed to judgment, unless the defendant appears; *à fortiori* justices of peace cannot. Some acts of parliament indeed give justices of peace a power of proceeding upon default: but *exceptio probat regulam in rebus non exceptis.* It seems to me therefore, that he should have been apprehended by warrant. Salk. 378.

POWYS *junior.* The design of the act of parliament is to give a summary way of proceeding. The defendant has been summoned,

(a) Ld Ray. 581

THE QUEEN *against* SIMPSON.

moned, which surely is sufficient; for it would be absurd that he shall take advantage of his own contempt.

Adjournatur (a).

(a) This case was argued a second time in Michaelmas Term 3. *Geo.* 1. post. 341.; and in the Hilary Term following PARKER, *Chief Justice*, delivered the resolution of the Court, that the conviction was good. S. C. post. 378.

*[251]

Case 124.

* Cole *against* Hawkins.

If to an *assumpsit* on 16 *Jan.* 1706 the statute of Limitations be pleaded; a replication stating a bill exhibited on 23 *Jan.* 1713, and that the cause of action arose within six years, is good on a general demurrer.

S. C. post. 348.

S. C Gilb. 279. S. C. 1. Stra. 21. Salk. 222. 2. Stra. 806.

ASSUMPSIT.—The plaintiff declares upon a promise the sixteenth of *January* 1706. The defendant pleads in bar the statute of Limitations. The plaintiff replies, that the bill was exhibited the twenty-third of *January* 1713, and that *causa actionis accrevit infra sex annos*. To this the defendant demurs.

MR. BRANTHWAYT *for the defendant* insisted, that this replication was *a departure* from his declaration; for though in transitory actions time and place are not material, and the jury may, notwithstanding the promise was at a different time or place, find for the plaintiff, yet the plaintiff shall not be at liberty himself to vary from or falsify his own record (a).

MR. SALKELD *for the plaintiff* argued, that *a departure* was always a going off from something material, that had been alledged before; and not from things immaterial. Now in transitory actions, time and place are not material; upon issue they are certainly immaterial. By the common law, time was so far material, that the time in the declaration must not be subsequent to the bringing of the action. In *Pollard's Case* (b) it is agreed, that if trespass be brought against two defendants, and one of them die *ante impetrationem brevis*, the action abates, but it is otherwise if pleaded that one of them died afterwards. The case of *Lee v. Raynes* (c), he said, was mis-reported; for he had in his hand a manuscript * report of that case, of Lord Chief Justice KEYLING, wherein it appeared, that the opinion of the Court in that case was, that the statute of Limitations does not take away the liberty of laying the action at any time; and therefore, if the defendant make the time material by pleading the statute, the plaintiff may follow him by varying from the time set forth in the declaration, provided it be not a time subsequent to the declaration. And this case is cited to this very purpose in 1. *Keble*, 799. In the case of *Webley v. Palmer* (d), a difference is taken between debt on bond and trespass; in action of debt upon bond, the plaintiff shall not in his replication vary from the date of his bond in his declaration; but in trespass, the plaintiff may vary from the day if the defendant necessitates him.

*[252]

(a) Year-Book 5. *Hen.* 7. pl. 28 Book of Assizes, 22. pl. 86. Cro Car 228. Cro. Jac. 364. 3 Lev. 348 Tyler v. Wall, Raym. 86.

(b) Plowd 90.

(c) Ray. 86. 1. Lev. 110.

(d) Michaelmas Term, 7. *Will.* 3. in B. R. Salk. 222.

PARKER,

Parker, *Chief Justice.* Time is material, if subsequent to the declaration; time is material, if the defendant answer to the time; time is material upon the statute of Limitations. As the matter stands upon the pleading, the plaintiff in his replication shews, that his bill was exhibited seven years after the cause of action. Now this being a general demurrer, it stands by virtue of the statute for the amendment of the law (*a*), as if there had been a verdict; so that it must be considered, whether this be a matter of form or substance.

Powys *senior*, *Justice.* Time here is material upon the statute of Limitations: not probable to lay it in the declaration so many years ago, unless the fact was so: most commonly, people lay their cause of action at a later time than it really was.

Powys *junior*, *Justice.* In transitory actions time and place must be laid for form's sake, as to the defendant and * jury; for the jury are not bound by it, and the defendant cannot traverse it without a special justification. The plaintiff indeed in his replication has verified the plea of the defendant. He has now fixed both the boundaries; in his declaration he has shewn the time of the cause of his action, in his replication the time when his bill was exhibited. And yet if instead of a demurrer issue had been joined, the jury might have found for the plaintiff, if in fact his cause of action was within six years. It is to be considered therefore, upon the statute for the amendment of the law, whether this not being a special demurrer, the fault in the pleading is not now cured. * [253]

Parker, *Chief Justice.* This may be considered likewise, that notwithstanding that statute, it does not follow that judgment must upon this general demurrer be given for the plaintiff, because upon a verdict for the plaintiff it would have been so; and that for this reason, because upon a verdict for the plaintiff a new fact is laid before the Court, *viz.* that the cause of action did arise within six years.

Adjournatur (*b*).

(*a*) 4 Ann. c. 16.

(*b*) In Hilary Term, 3. Geo. 1. judgment was given for the plaintiff. Post. 278.

Walker *against* Langhton. Case 125.

A declaration on a penal statute concluding *et inde*, &c. shall be intended *tam pro*, &c.

THIS was an action *qui tam*; and the objection was, that the conclusion was "*et inde producit sectam*" (*a*) generally; and not "*tam pro domina regina, quam pro seipso*."

But it was resolved that this must be so understood; and precedents being both ways,

Judgment *respondeas ouster* was awarded.

(*a*) Anciently, "*inde producit sectam*," was producing witnesses. 17. Ed. 3. 48. Fleta, lib. 2. cap. 62. sect. 2. cap. 63. sect. 9. 10. 11. 5. Edw. 3. 171. 10. Edw. 2. 291.—Note to the former edition.

Johnson

Case 126. **Johnson *against* Gardiner.**

If an executor promise to pay a debt of the testator's at a future time, in consideration of forbearance, and be sued for it *as executor*, the statements as executor are *surplusage.*

THIS was A WRIT OF ERROR out of the court of common pleas.

FOR PLAINTIFF IN ERROR *it was insisted*,

FIRST, That the declaration was naught, because it was an action brought against the defendant, *as executor*, upon a promise made by the executor *post mortem testatoris*, *viz.* that whereas the testator was indebted to the plaintiff in *March* for goods sold and delivered, he promised to pay upon the twenty-third of *November*. Now this promise of the executor being founded plainly upon the consideration of forbearance, made it the contract of the executor; and therefore the action should have been brought against him in his own name.

IT WAS REPLIED *for the plaintiff in error*, that the consideration was not the forbearance, but the old debt, the debt of the testator's; and that the promising to pay it barely upon a future day, will not make a new consideration.

TO THIS *it was answered*, that though the defendant is named executor, yet it appears by the declaration, that the executor is chargeable upon his own contract, and the bare naming him executor *non nocet*. It is always supposed, where there are promises of payment upon such considerations, that the executor has assets, and therefore it is not necessary to aver his having assets; for unless he had, there was no occasion for such a promise (*a*).

If a defendant be improperly named *executor* in the declaration, judgment *de bonis propriis* is good.

SECONDLY, But supposing the action well brought against him *as executor*, then the judgment was wrong, being *de bonis propriis*, instead of *de bonis testatoris*.

TO THIS *it was answered*, that upon an *assumpsit* by an executor, judgment is always *de bonis propriis*; for it is all one as if the executor had given a bond for the money (*b*).

* [255] * SECONDLY, In the case of *Collins v. Thoroughgood* (*c*) judgment *de bonis testatoris* was given in covenant, though non-repair was in the time of the executor.

PARKER, *Chief Justice.* The naming him executor is surplusage; because it appears upon the face of the record, that the demand was a demand against him upon his own contract. In effect the forbearance is the consideration of this promise; because without forbearance no advantage can be taken of this promise (*d*).

And to this opinion the rest of the Court inclined.

Sed adjournatur.

(*a*) Cro. Jac. 602. 613. And see Pearson *v.* Henry, 5. Term Rep. 6. that a promise by an executor, if he has no assets, is *nudum pactum*.

(*b*) 9. Co. 93. Cro. Eliz. 91. 406.— But the goods of the testator in the hands of his executor, cannot be seized in execution of a judgment against the executor in his own right. Farr *v.* Newman, 4. Term Rep. 621.

(*c*) Hob. 188.

(*d*) Yard *v.* Ellard, Salk. 117.

Parker

Parker *against* Crook.

Case 127.

An action lies on a deed dated at *Fort St. George* in the *East Indies*; but in the declaration a place in *England* must be laid as *a venue*.

Salk. 659, 660.

THIS was an action of covenant upon a deed indented. It was objected to the declaration, that the defendant is said in the declaration to continue at "*Fort St. George in Indibus Orientalibus*;" and upon *oyer* of the deed, it bears date at *Fort St. George*; and therefore the Court, as was pretended, had no jurisdiction (*a*).

PARKER, *Chief Justice*. An action will lie in *England* upon a deed dated in foreign parts, or else the party can have no remedy; but then in the declaration a place in *England* must be alledged *pro formâ* (*b*). Generally speaking, the deed, upon the *oyer* of it, must be consistent with the declaration; but in these cases, *propter necessitatem*, if the inconsistency be as little as possible, it is not to be regarded; as here the contract being of a voyage to be performed from *Fort St. George* to *Great Britain*, imports that *Fort St. George* is different from *Great Britain*.

Afterwards in *Hilary Term*, the plaintiff had his judgment, notwithstanding this objection (*c*).

(*a*) Latch, 4. Lutw. 950.

(*b*) See the case of Fabrigas v. Mostyn, Cowp. 161.

(*c*) The words "*in Indibus Orientalibus*" do not necessarily import the place to be out of *England*; there is a place called *Holland* in *Lincolnshire*; and there may be a *Fort St. George* in the parish of *St. Martin's*. In the case of Ward v. Kedsgrove, W. Jones, 69. the same objection taken and over-ruled.—NOTE *to former edition*.

MICHAELMAS

MICHAELMAS TERM,

The First of George the First,

IN

The King's Bench.

Thomas *Lord* Parker, *Knt. Chief Justice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Pratt, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*
Nicholas Lechmere, *Esq. Solicitor General.*

Vincent *against* Atwood.

A SCIRE FACIAS was brought against bail. The defendant pleaded, that the principal died before the return of the *capias ad satisfaciendum.* The plaintiff replied, that the principal did not die before the return of the *capias ad satisfaciendum.* The defendant demurred.

To a *scire facias* against bail, if the defendant plead the death of the principal before the return of the *capias*; a REPLICATION that the principal did not die before the return of the *capias* is good upon demurrer.

AGAR, *for the defendant*, argued, that the replication was naught:

FIRST, Because the plaintiff has not set forth that there was any *capias* at all sued out; but only that the principal did not die before the return of the *capias.*

* SECONDLY, Because by this replication there is an issue formed, wherein the jury must at once try matter of law, matter of record, and matter of fact. * [257]

BRANTHWAITE *for the plaintiff.*

When the defendant pleads, that the principal died before the return of the *capias*, he certainly admits, that there was a *capias* sued out; and the only thing doubted is the death of the principal, &c. It is only necessary for the plaintiff to answer the defendant's plea, and not to set forth that which is admitted by the defendant. In a *scire facias*, it is not necessary to set forth the awarding of a *capias*,

VINCENT *against* ATWOOD.

capias (*a*). The condition of a bond was, that *H.* should marry the daughter of *D.* before *Easter*; and in debt brought upon this bond, it was held (*b*), that if the defendant pleads that the daughter died before *Easter*, it is enough for the plaintiff to say in his replication, that she did not die before *Easter*, without setting forth that he did not marry her. The reason is, because the not marrying is a fact admitted; and the other the only point in question. Had the plaintiff replied that there was a *capias* sued out, and the defendant had rejoined "*nul tiel record*," the rejoinder would have been *a departure* from his bar. How then can it in reason be necessary for the plaintiff in his replication to set forth that which the defendant cannot deny in his rejoinder without a departure? In the case of *Perkins v. Woolaston* (*c*), in an action of debt against bail, the defendant pleaded *no capias*; the plaintiff replied, there was a *capias*; the defendant rejoined, that the force of the *capias* was suspended by a writ of error; and it was resolved, that this rejoinder was *a departure* from the bar.

Judgment *nisi* was given for the plaintiff (*d*).

(*a*) Cro. Jac. 97. Lutw. 1281.
(*b*) Yelv. 24.
(*c*) 6. Mod. 139.
(*d*) See Chandler *v.* Roberts and Another, Bail of White, Doug. 61. Henderson *v.* Withy, 2 Term Rep. 576.

* [258]

Case 129.

* The Queen *against* Aires.

Scire facias to repeal letters patents is not abated by the death of the king.
S. C. post. 354.
S. C. 1. Stra. 43.

A SCIRE FACIAS was brought by the late queen, to repeal her own letters patents, whereby she had granted some fairs to *Thomas Aires*, in the town of *B[illegible]*, in the county of *Derby*.

The *scire facias* set forth, that precedent to the grant of the fairs a writ of *ad quod damnum* issued out; but that it was clandestinely executed, so that the jury found that the grant was not *ad damnum* of any-body; when it was *ad grave damnum* of *the Earl of Rutland*, who had fairs in the manor of *Bakewell*, four miles distant.

The defendant, *protestando* that it was not clandestinely and fraudulently executed, pleaded, that the grant of the fairs to him was not *ad damnum* of the *Earl of Rutland*, or any-body whatsoever.

Upon this issue was joined in chancery.

A *venire* was awarded out of that court, returnable into the court of king's bench, and the court of king's bench awarded a *distringas*; upon which the cause was tried; and the jury found, that it was *ad grave damnum* of *the Earl of Rutland*.

MR. SALKELD moved in arrest of judgment,

FIRST, That the *scire facias* was abated by the death of THE QUEEN. By the common law, there is no difference between the king and the subject; but the death of the plaintiff had in both

cases

cases abated the suit. Indeed, were this an original writ, it would be helped by the statute 1. *Anne*, c. 8. but being a judicial writ, it is not. In the case of *Sir Oliver Butler (a)* it was held, that a *scire facias* is a judicial writ. The Queen against Aires.

* Northey, *Attorney General*, answered, that this was not a judicial but an original writ; that judicial writs are those only that are founded upon judgment and judicial process; but that this was no consequence of any judicial proceeding, or founded upon the former letters patent, but purely the fraud; and that there are many *scire facias's* in *the Register*, among the original writs (*b*). * [259]

The second exception was, that upon issue joined the court of chancery (not being a proper court for trial of a matter of fact) is at a full stand, and the court of king's bench ought to have awarded the *venire*; whereas here the *venire* is awarded by the court of chancery, returnable into the court of king's bench. And the case of *Martin v. Blackston (c)* was cited.

If on a *scire facias* to repeal a patent, issue be joined in chancery, that court may award a *venire*.

To this exception *it was answered*, that the constant practice is, for the chancery to award the *scire facias*, returnable into the court of king's bench. So is the case of *Jefferson v. Morton and Dawson (d)*, and *Sir George Reynel's Case (e)*. And the case of *Martin v. Blackston*, as reported in *W. Jones*, 82. does not make against it. 9. Co. 99. a.

The Court. There is no other way to give day in this court but by awarding a *venire* out of chancery returnable here; and it is always done so.

The third exception was, that the fairs granted to *Mr. Aires* were four; one upon *June* the twenty-third, another *October* the seventeenth, a third *November* the twenty-eighth, another *April* the twelfth: those granted to *the Earl of Rutland* were upon *March* the twenty-ninth, *May* the seventeenth, and *August* the twenty-fifth. It appears plainly that the days are very different; and, for aught appears upon the record, the places where these fairs are to be held may be forty miles distant; for the record says only, "that they are four miles distant," but does not add, "and no more." * Now it was said, that it was not to be presumed, that where time and place are so different, the one set of fairs could be prejudicial to the other. * [260]

A *scire facias* to repeal a charter to hold fairs, stating, that they are four miles distant, is sufficient.

The Attorney General replied, that time and place were matters of evidence for the jury, not the Court, to consider of; that damage or no damage very often depended upon different circumstances; and that it was possible for a market to be held on the same day, and close by another, without prejudice; as in *London*.

Dyer, 276. Sir Oliver Butler's Case, 3. Lev. 220.

(*a*) 3. Lev. 220.

(*b*) The Court were all of opinion, that this was helped by the statute of the 1. *Anne*, c. 8. S. C. post 355.

(*c*) Palm. 410. S. C. W. Jones, 82.

(*d*) 2. Saund. 6. 23.

(*e*)

A *scire facias* held to be a writ of right, where the patent is prejudicial to the subject.

THE FOURTH EXCEPTION was, that a *scire facias* was not the proper remedy; but that it should have been by *action on the case*, to have recovered in damages.

THE ATTORNEY GENERAL, in answer to this exception, cited, *Dyer*, 197, 198. 11. *Co. Rep.* 74. 8. *Rep.* *Prince's Case*, *Fitzherbert*, *tit.* "*Brief*," 651. 2. *Vent.* 344. *Sir Oliver Butler's Case*, 3. *Lev.* 220. where it is held, that the crown *de jure* ought to suffer the subject to use their name.

Title to a fair.

THE FIFTH EXCEPTION was, that the *Earl of Rutland* had not set forth a sufficient title to the fair, by alledging it to be appendant to a manor.

The king's bench may give judgment on an issue out of chancery.

THE SIXTH EXCEPTION was, that being an issue out of chancery, and sent to the common law only for trial, the record ought to be remitted into chancery, and judgment given there, and not here. *Raym.* 178.

But THE COURT said, this point had been so firmly settled, in the case of *Jefferson* (a), that they would not suffer it to be debated.

Adjournatur. To be set down in the paper (b).

* [261] (a) 2. Saund. 26. (b) In Hilary Term, 3. *Geo.* 1. judgment was given for the king.

Case 130. * The Parish of Pawlet *against* The Parish of Burnham.

Actual service for a year, as well as hiring for a year, are necessary to make a settlement.

A COVENANT SERVANT FOR A YEAR, at the rate of three pounds a-year wages, left his master by consent, three weeks short of a year; his master deducting six shillings for the three weeks out of his wages. By order of two justices it was adjudged a good settlement.

S. C. Foley, 206. S. C. 1. Sess. Cases, 77.

Upon an appeal to the sessions, the Court being divided, the order of the justices was confirmed, and a case stated specially; which being removed by *certiorari*,

IT WAS URGED *in support of the order:*

FIRST, That it being set forth in the order, that he was a covenant servant, it must be intended a covenant in writing; for the law knows nothing of a parol covenant; if so, the covenant could not be discharged by parol; and consequently, in point of law, he continued a servant to the end of the year.

SECONDLY, It was said, that his departure but three weeks before the end of the year shews it to have been a fraud, contrived to prevent a settlement.

THE COURT quashed the order; and held actual service for a year necessary.

(a) See Rex v. Preston, 2. Const, 403. Rex v. Castlechurch, Burr. S. C. 68. Rex v. Goodneston, 2. Burr. S. C. 251. Hawking v. Eastbrooke, 2. Const, 502. Rex v. Nether Heyford, Burr. S. C. 479. Rex v. Frome Selwood, Burr. S C. 565. Rex v. Bray, Burr. S. C. 682. Rex v. Potter Heigham, Burr. S. C. 690 Rex v. St. Bartholomew, Cald. 48. Rex v. Sulgrave, 2. Term Rep. 376. Rex v. Kenilworth, 2. Term Rep. 598.

* Clerk

Clerk *against* Lee.

Case [illegible]

MARY CLERK being prosecuted in the spiritual court, by A PROCTOR, for his fees, in a suit brought by her against her then husband *Young*, to be divorced, prayed *a prohibition*; suggesting,

A libel in the spiritual court against a woman divorced, for the expences of such divorce, must be against her as a *feme sole*.

FIRST, That she was *a feme-covert*; and as such not liable to be sued singly to pay the fees.

SECONDLY, that all actions upon the case are suable at com- * [262] mon law, *et non alibi*.

* SALKELD shewed cause why a prohibition should not go.

FIRST, As to her being a *feme covert*, he insisted, that it was now too late for her to take advantage of it, because it had not been pleaded in the spiritual court.—And, that after a sentence of divorce, the wife stands in the capacity of a single woman, and has a property distinct from her husband.

MR. DARNELL answered, that it was very true, that after a sentence of divorce husband and wife are to be considered as single persons; but that here there was no sentence of divorce, but the marriage declared to be null and void.—And, that her marriage to *Clerk* was precedent to the proctor's suit for his fees, in that suit where the marriage between her and *Young* was declared null.

See Ellah v. Leigh, 5. Term Rep. 679.

But this point was thrown out of the case, it appearing, that the libel was brought against her not as *a feme sole*, but against her and her husband *Clerk*.

PARKER, *Chief Justice*. If the spiritual court has jurisdiction, perhaps it is not necessary, by the forms of their law, for the husband to be named in the suit; as in the case of an executrix. And the reason of the difference between the common law and the civil law is this, that in the spiritual court the husband, though not named, may come in *pro interesse suo*, and may defend himself should the wife desert the cause. Whether therefore the husband must be joined must be determined by the spiritual law, and may be a good cause for an appeal, but can be none for a prohibition.

THE SINGLE QUESTION then was, Whether *a proctor* may not sue in the spiritual court for his fees.

A proctor cannot sue in the spiritual court for his fees.

MR. SALKELD argued, that he might, both from the authorities on this subject, and from the reason of the thing.—As to the authorities. In the case of *Horton v. Wilson* (*a*) it is held, that a proctor may sue in the spiritual court for his fees; and the reason given is, that fees are due by provincial constitutions. In a case in *Ventris* (*b*) it is said, that if the custom be denied, then a prohibition must go; but not otherwise. So also in the case of *Dayley v. Dod* (*c*) it is held, that if the custom be denied, a prohibition must go;

(*a*) 1. Mod. 167. S. C. 3. Keb. 203. S. C. 1. Freem. 129.

(*b*) Anonymous, 1. Vent. 165.

(*c*) 2. Keb. 810. 845.

non

CLERK v. LEE. *non aliter*; and said, that the jurisdiction extended as much *to fees* as *to costs*. In the case of *Webb v. Hartsel* (*a*), HALE, *Chief Justice*, says, that no action on the case was ever brought for such fees, and therefore they may be sued for in the spiritual court.—As to the reason of the thing. Fees are nothing but wages for work done in a spiritual court, by a spiritual officer, in a suit of
[263] spiritual conusance. * A proctor is as much an officer of the spiritual court as an attorney of a court at common law. The spiritual court is an ancient court, and has ancient officers belonging to it to carry on the business, and to preserve the honour of the court; but it is impossible that these ends can be attained while the court is bereaved of the attendance of its officers. A proctor is compellable by law to serve in his employment (*b*). In *Co. Lit.* (*c*) it is held, that an attorney is so too: consequently the attendance of neither of them ought to be hindered, by obliging them to sue for their fees in foreign courts. By the statute of 5. *Eliz.* c. 4. justices of the peace have power to compel men to serve in husbandry; in which statute there is no express clause whereby the justices are enabled to redress such servants, in case their wages are denied; yet it is held, by the equity of the statute, that since the justices have a power to compel their service, they should likewise have a power to give them redress as to their wages (*d*). All courts have proper fees belonging to their respective officers; of which the each court is most certainly the properest judge (*e*). The spiritual court has jurisdiction to try extortion in taking fees (*f*).

Salk. 330. 333. DARNELL *for the prohibition*. As to the cases quoted; *non negandum* but there have been resolutions that way; but the point is now settled, in the case of *Johnson v. Oxendon* (*g*), where most of the cases now quoted are taken notice of; and this reason given by *Chief Justice* HOLT, that if proctors might sue in the spiritual court for their fees, they would avoid the statute of Limitations. In the case of *Bricker v. Goodall* (*h*), a prohibition was granted,
* [264] where a woman was sued for fees, in a cause * carried on by her against her husband, in order to bring the matter judicially before the court. As to the case of extortion, no weight is to be laid upon it, because no favour is shewn to so odious a crime. As to the arguments from the reason of the thing; if they prove anything they prove too much, *viz.* that a proctor cannot sue at common law.

PARKER, *Chief Justice*. Whether the fees may be sued for in the spiritual court, is a matter much litigated; and there are resolutions both ways.

(*a*) 3. Keb. 516.
(*b*) Michaelmas Term, 8. *Will.* 3.—See Salk. 86.
(*c*) Co. Lit. 195.—See Salk. 86.
(*d*) Salk. 441. Stra. 1002.
(*e*) Ld. Ray. 149.
(*f*) 2. Keb. 615.
(*g*) 4. Mod. 254.
(*h*)

EYRE,

EYRE, *Justice*. There is no suing in the court of admiralty or court of honour for fees. In the case of *Donvill v. Oldish* (a), a prohibition was granted by all the Judges of *England*.

PRATT, *Justice*. I see no reason why fees in the spiritual court may not be recovered at *common law*, as well as fees in chancery.

Adjournatur (b).

(a) Shower's Cases Parl. 58.
(b) See Pollard *v.* Gerrard, 1. Ld. Ray. 703. and 2. Stra. 1108. Dougl. 629.

*[265]

* Potter *against* Pinkney.

Case 132.

If in trespass for taking a distress, the defendant justifies under a void lease, a replication that the distress was sold or abused, admits the lease to be good.

TO AN ACTION OF TRESPASS for goods taken and carried away, the defendant pleaded, that he was seised of such a lease; but in conveying his title to the lease, set forth such matter as shewed the lease to have determined before it began; then goes on, and says, that *virtute* of such a lease he entered and made a lease to the plaintiff, reserving such rent; and for the rent behind justifies the taking, &c. The plaintiff replied, that the goods distrained were sold. The defendant, in his rejoinder, justified the sale, by virtue of the statute 2. *Will. & Mary*, c. 5.. To this rejoinder plaintiff demurred; and the defendant joined in demurrer.

BRANTHWAITE *for the plaintiff*, That there was no good title set forth to the lease in the plea, but matter directly destroying it; and that the first lease failing, the second must do so too.

SALKELD *for the defendant*, That if the defendant has failed in deriving to himself a lawful ability to make the lease to the plaintiff, the consequence will only be, that that entry, which he sets forth to be *virtute* of the lease, must be taken to be *a disseisin*, and a tortious fee-simple sufficient to support the lease.

IT WAS ALSO SAID *for the defendant*, That the plaintiff by his replication, though he had not said *[illegible]* the defendant made such a lease, &c. yet by pleading such matter as abuse of the distress (matter confessing and avoiding the plea of the defendant), that plea must now be taken for true; and that there was such a lease made, and the rent behind.

And of this opinion were the Court.

*PARKER, *Chief Justice*, also said, that the title was but matter of conveyance or inducement: that the substance of the plea was the lease, and the arrearages of rent.

*[266]

BRANTHWAITE *for the plaintiff* then took exceptions to the rejoinder.

The notice of making the distress need not be given to the owner of the goods, but to the lessee.

FIRST, That notice should have been given to the owner of the goods; not to the lessee.

But THE COURT over-ruled this objection; for they held, that the statute did not require notice to be given to the owner, for he might not be known but to the lessee.

SECONDLY,

Notice of distress must be in writing.

SECONDLY, That notice in the statute must be understood to be notice in writing; and that it was not set forth in the pleading that this was notice in writing.

BRANTHWAITE *for the defendant* said, that if the word "notice" did in the act import notice in writing, it must do so too in the plea, which pursued the very words of the act.

In justifying a distress, the cause of it must be shewn.

THIRDLY, It is said in the pleading, *quod immediatè post districtionem sic captam*, he left notice of taking, &c. *et pro causâ inde*; whereas the cause should have been set forth.

THE COURT held this objection fatal, for that it was direct nonsense; and that if it had been *cum causâ*, though that had been sense, yet it had been insufficient; for the Court ought to be informed upon the pleading what the cause was that was left.

Judgment was given for the plaintiff.

* [267]

Case 133. * Weddall against The Manucaptors of Jocar.

To a *scire facias* on a recognizance against bail, A PLEA that the plaintiff died before the *capias* was issued, is good on demurrer.

S. C. post. 303.

AN ACTION was brought in the court of king's bench; and a recognizance entered into by the bail, to render the body of the principal, or pay the condemnation; and judgment was given against the principal for one hundred and five pounds for damages and costs. A writ of error was brought into the exchequer-chamber, where the judgment was affirmed, and nine pounds additional costs given for the delay, &c.

A SCIRE FACIAS was brought against the bail upon this recognizance. The bail prayed *oyer* of the recognizance, which is set forth, &c. And then the bail pleaded the death of the principal *ante emanationem brevis*. To this plea the plaintiff demurred, because *duplex placitum, et carens formâ*.

MR. FORTESCUE *for the plaintiff* insisted, that this plea was naught, because it was impossible for any material issue to be joined upon it. For though if the jury find the death of the principal at the time of the *capias* issuing out, it would make all right, since he that died before the issuing out of the *capias* died certainly before the return of it; yet should the jury find the contrary, that he did not die before the issuing, &c. what is the plaintiff the better? since he might be alive at the issuing out of the *capias*, and dead at the return. Now shall a plaintiff be compelled to take issue upon a matter which, if found against him, he is gone; but if found for him, he is never the nearer? This is the very case of debt upon bond, and *solvit ante diem* pleaded. In the cases of *Atwood v. Coleman (a)*, and *Meril v. Josselyn (b)*, it was held, that in such cases there is no way for the plaintiff to help himself but by demurrer.

(a)

(b) Ante, 147.

BRANTHWAITE

WEDDALL *against* MANUCAPTORS OF JOCAR.

* BRANTHWAITE *for the defendant.* The condition of the bail-bond is either to render, &c. or pay the condemnation. It is to be considered what pleas are good and proper for the bail. First, The condition of the recognizance being in the disjunctive, he may plead the performance of either part of the disjunctive. Secondly, By way of excuse for not performing, he may plead the death of the principal before any *capias* issued out, or the death of the principal after the issuing out of the *capias* and before the return. For the condition of rendering is not to be understood of rendering the body of the principal immediately after judgment against him; but rendering upon demand by due process of law, *viz.* the return of the *capias.* The issuing out of the *capias* is the beginning, and the return of it is the completion, of the legal demand. In the case of *Sparrow v. Sowgate* (*a*), in an action of debt, the death of the principal before the issuing out of any *capias* was pleaded; and on demurrer judgment was given for the bail; and this difference was taken, that when a condition is in the disjunctive, if one part of the condition becomes impossible by act of God, the obligor is discharged from the performance of the other part (*b*). Death before the issuing out of the *capias* is certainly death before the return (*c*).

As to the duplicity of the plea, the answer is, that no advantage can be taken of it, because it is but matter of form, and aided upon a general demurrer. And this is no other; for though it be said, *quod placitum est duplex et caret forma*, that is not enough; for no advantage is to be taken of a double plea upon demurrer, without setting forth in the demurrer wherein the doubleness of the plea consists. It was so determined in the case of *Smallwood v. Bishop of Coventry* (*d*), in *Easter Term*, in the thirty-first year of *Queen Elizabeth.*

* PARKER, *Chief Justice.* "Rendering" is to be understood * [269] rendering upon demand, *viz.* at the return of the *capias*; for then is the legal demand completed. Not rendering then is a refusal; and then the bail become liable, and not before. Pleading, therefore the death of the principal before the return of the *capias* is most certainly a good plea. But pleading the death of the principal before the issuing out of the *capias* is certainly an immaterial plea, because it is material only in case it be found one way: for death before the issuing out of the *capias* is death before the return of it. But suppose it be found, that the principal did not die before the issuing out of the *capias*, that is plainly nothing to the purpose; for notwithstanding this he may die before the return of the *capias.* As for the authorities wherein the pleading is, "death "of the principal before the issuing of the *capias*," this answer may serve, that the objection was never taken; and that the doubt in those cases was, whether the bail was not bound to render the

(*a*) W. Jones, 29.
(*b*) But see the case of Thomas v. Howell, an exception to this rule, 1. Salk. 170. 4 Mod. 66.
( ) Hutt. [illegible] Mod. 4[illegible].
(*d*) 1. [illegible]

WEDDALL *against* MANUCAPTORS OF JOCAR.

principal in convenient time, or had time to do it until the iſſuing out of the *capias*. This objection therefore, the ſtrength of which lies upon this, that the principal has time until the return, &c. would have been abſurd, at a time when it was a controverted point, whether the bail had time until the iſſuing out of the *capias*. But now the law is ſettled, that he has time until the return. The caſe at bar is exactly the ſame of *ſolvit ante diem* pleaded to a bond.

The REST OF THE JUDGES being of the ſame opinion, the plaintiff would have had his judgment.

If judgment be general, execution muſt be general.

But ANOTHER OBJECTION was ſtarted, *viz.* that the *ſcire facias* ſets forth all the proceſs until judgment in the court of king's bench, and likewiſe all the proceedings upon a writ of * error until affirmance of the judgment, and the damages and coſts in both courts, and concludes with a demand for *prædict. damn. miſ. cuſtag.* in both courts; whereas bail is not liable for thoſe in the exchequer-chamber. 1. *Rolle's Abr.* 335.

* [270]

THE COURT. If judgment be general, execution muſt be ſo too; but ſince the ſums are in their own nature ſeveral and diſtinct, why may not the Court enter the judgment *pro damn. miſ. et cuſtag. in cur. dom. reg. banc. recuperat* (a)?

(a) See the ſecond argument in this caſe, *poſt* 303.

Caſe 134.

Shuttleworth *againſt* Patterſon.

A writ of enquiry is good, although the words "*et habeas ibi hoc breve*" are omitted.

THIS was a motion to ſet aſide a writ of enquiry for want of theſe words: "*et habeas ibi hoc breve*."

THE COURT. It is well enough. There is a known difference between original and judicial writs, and that defect in form will abate the former, but defect in ſubſtance only can the latter; it was thus reſolved in *Blackmore's Caſe* (a). The ſubſtance of the writ is only to command the ſheriff to take an inquiſition, and the words omitted are purely directory to the ſheriff; becauſe, without returning the writ, it cannot appear to the Court, that he had an authority to take the inquiſition; and if the writ be returned, as here it is, all the ends of thoſe words, now omitted, are effectually anſwered. Beſides, a command to return the inquiſition is virtually and conſequentially a command to return the writ, becauſe the inquiſition cannot be returned to any purpoſe, unleſs the writ be ſo too; for it cannot otherwiſe appear that it is a return to the writ, or that the ſheriff had any authority for taking the inquiſition. The words "*ſi ſibi viderit expedire*" were left out in *ſcire facias*, yet * it was held good for the very ſame reaſon, *viz.* being a judicial writ; which ſhall not be abated for want of form.

[271]

(a)

The

The King *againſt* Miles.

Caſe 135.

THIS was a motion to quaſh an order of baſtardy.

An order of baſtardy alledging the child born in ſuch a town, is a ſufficient ſtatement of the place of its birth.

THE FIRST OBJECTION againſt the order was, that it ſhould have been ſet forth, what place the child was born at; becauſe that gives the juſtices their juriſdiction.

THE COURT. The adjudging ſuch a one the father of a baſtard-child, which was born in ſuch a town, is a ſufficient ſetting forth the place of his birth.

THE SECOND OBJECTION was, that the pariſh is out of time; for the child was fourteen years of age.

An order of baſtardy may be made fourteen years after the birth of the child.

THE COURT. The pariſh is not confined to any time by the ſtatute; and there is good reaſon ſet forth in the order why the pariſh did not complain ſooner, *viz.* that the father ran away, and could not be found ſooner; and having no eſtate, nothing could be done in his abſence.

THE THIRD OBJECTION was, that it is awarded by the order, that the father ſhall give ſecurity, both for the performance of the order, and likewiſe for indemnifying the pariſh for the future.

The juſtices cannot take ſecurity for performance of an order of baſtardy.

THE COURT. The giving ſecurity is a thing very reaſonable in itſelf; but ſince there have been former opinions of the Court, that the juſtices have not a power to award the giving ſecurity for the due performance of their order, until ſuch time as their order has been contemned, the order muſt be quaſhed *quoad* that: but as for giving ſecurity for indemnifying the pariſh, it is right.

3 Salk. 66.

*[272]

* The Pariſh of Newark *againſt* The Pariſh of Wirkſworth, in Derbyſhire.

Caſe 136.

WHEATCROFT, with his wife and children, were, by an order of juſtices, removed to *Wirkſworth*, as the place of their laſt legal ſettlement.

The ſettlement of the father is *primâ facie* the ſettlement of his children.

Upon an appeal to the ſeſſions, it appeared, that *Newark* was the laſt legal ſettlement of *Wheatcroft*, and conſequently of his wife and children; and they were therefore all removed to *Newark*.

S. C. 1. Seſſ. Caſes, 84.

THE COURT was moved to quaſh the order of ſeſſions as to the children; becauſe it was no conſequence that *Newark* being the laſt legal ſettlement of the father, it muſt be ſo of the children; for they might have gained a new ſettlement.

See Rex *v.* Stanwix, 5. Term Rep 670.

THE COURT. This is not to be ſuppoſed.

Cottingham

Case 137.

Cottingham *against* Lofts.

A prohibition does not lie on a suggestion of a dispute between *a peculiar* and *the prerogative court*, whether *bona notabilia* or not.

Salk. 547.

MOTION FOR A PROHIBITION, suggesting, that where there is a dispute between A PECULIAR and THE PREROGATIVE COURT, whether *bona notabilia* or not, it must be tried by the common law. And the case of *Brook v. Sir William Turner* (a) was cited.

THE COURT. This must often have happened; and if a prohibition lay, there must have been frequent instances of it. Where a prohibition is granted *pro defectu triationis*, it is upon supposition of different rules established by the spiritual and common law; as in case of prescription; but as to *bona notabilia*, the spiritual and common law are the same.

The case quoted was not much regarded (b).

(a) 1. Mod. 217.

(b) In the case quoted, NORTH, *Chief Justice*, expressly says, that when a question arises, whether the matter is cognizable before *a peculiar*, or before *the ordinary*, as to what shall be *bona notabilia*, the common law retains the jurisdiction of determining. 1. Mod.

HILARY TERM,

The First of George the First,

IN

The King's Bench.

Thomas, *Lord* Parker, *Chief Justice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Pratt, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Nicholas Lechmere, *Esq. Solicitor General.*

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*[273]

* Walter *against* Warren. Case 138.

In what case time, in trespass, is necessary to be precisely alledged.

THIS was an action brought by the husband for taking his wife away, and ravishing her, *per quod consortium, &c. per magnum tempus*, viz. *per spatium unius anni, amisit, &c.* There was a verdict for the plaintiff, and general damages given.

IT WAS MOVED *in arrest of judgment*, that a year had not expired from the first of *October*, the time of the offence, to the time of the verdict, and much less at the time of the action commenced; and therefore, general damages being given, it was erroneous (*a*).

ON THE OTHER SIDE *it was said*, that coming under a *per quod* it was only consequential, and laid by way of aggravation of damages, and was not the cause of action; that the *per magnum tempus* was enough, and the "viz. *per spatium, &c.*" should be rejected as surplusage, because impossible.

* PARKER, *Chief Justice*. This case is widely different from the common cases of *viz.* a time that is altogether impossible; as the thirtieth of *February, &c.* for here the whole time is not impossible; *[274]

(*a*) Hobart, 189. 1. Mod. 271. 2. Saunders, 169. Hambleton *v.* Veere, Horn *v.* Chandler, Moore, 887. a case full in point.

WARNER *against* WARREN.

sible; and it cannot be known for how much of it the jury gave the damages; [illegible] probably to the time of the verdict.

Adjournatur.

Case 139.

Holroi *against* Ebizson.

If, on a writ of error on a judgment from the common pleas, the plaintiff in error be non-prossed, yet no interest shall be allowed on the damages.

AN ACTION was brought in the court of common pleas, upon several promises; and judgment being by default, a writ of inquiry was executed, and four hundred and twenty-four pounds damages given. Error was brought into the court of king's bench, and the plaintiff in error *non prossed.*

THE COURT was moved upon the statute 3. *Hen.* 7. c. 10. that the defendant in error should, besides his costs, have interest allowed him for the sum adjudged due to him, pending the time of the writ of error, from the judgment.

On the statute 3. & 4. *Anne*, c. 9. lately made, concerning *promissory notes*, the word "damages" has been extended to interest. On an action of debt, if judgment go by default, interest is allowed by way of damages, *occasione detentionis debiti* (*a*). Where judgment goes by default, the Court gives the damages, without putting the party to the trouble of a writ of enquiry (*b*). The entries of costs and damages in writs of error seem to favour this construction. In *Co. Entries* (*c*) the entry is, "*pro misis custagiis et* "*damnis*," which he had by reason of the delay. On a *quare impedit*, where a writ of error was pending a year, the value of the living for a year was given in damages, by reason of this very statute (*d*). * It is true, that in writs of error into the exchequer-chamber, interest is not allowed: but this writ of error is given by 27. *Eliz.* c. 8. and therefore not affected by stat. of 3. *Hen.* 7. c. 10. * [275]

IT WAS SAID, *on the other side*, that this was a matter of importance; for the arguments, if good, hold equally in all actions as well as in this. The preamble takes notice of writs of error being frequently used only for delay; and the body of the act gives the party costs and damages only for this wrongful delay and vexation. A writ of error is a writ of right; it is founded upon the fallibility of mankind and a just policy, that a man had better be a little longer kept out of his money than a wrong sentence given. This act, and all others that lay restraints upon writs of error, have received a strict interpretation, because restrictive of the common law; for which the Counsel referred himself to cases quoted in the case of *Hamond v. Webb* (*e*). It appears from the purview, that the design of the act was only to restrain the abuse of writs of error, and ought to be extended only to those that are brought for delay.

Salk. 504. 264.

(*a*) Holdip, Ex. of Dowse, v. Otway, 2. Saund. 106.

(*b*) 1. H. Bl. Rep. 252. 542. 4 Term Rep. 275. 493. [illegible] Term Rep. [illegible] Tidd's Practice, 515.

(*c*) Co. Ent. 24 b.

(*d*) Anonymous, Cro. Car. 145.

(*e*) Post. 281.

The

The words in the act, "at the discretion of the justices, &c." shew plainly, that the damages intended by the act must be such damages as are uncertain in their nature; but legal interest is a certainty. "Costs" and "damages" are, in law, synonymous terms; "damages" do *prima facie* signify "costs," though sometimes, *ex necessitate rei*, it is extended to signify that damage which is the cause of action (*a*). In an action of debt brought against an executor, the word "*damna*" in the judgment signifies the costs (*b*). As to the case of *Holdip v. Otway* (*c*), the reason given there will not extend to this case; and proves no more than that the Court may do it, not that they will or must. * As to the forms of the entries *pro damnis et custagiis*, they follow the words of the act, but do not prove what the import of the word "*damna*" is; whether it is, or it is not, synonymous with the word costs. * [276]

Holaby against Eriesom

To the case in *Cro. Car.* (*d*), and *Hensloe v. Bishop of Sarum* (*e*), it was answered, that it does not come up to the reason of this case; because the value was there in its own nature certain, and so much made of it by the other side; but here it is by no means certain what interest would have been made of the money; and to have made that case come up to this, not only the value, but the interest of that value, should have been allowed. It was admitted, that the practice of the court of exchequer, upon writs of error, is otherwise; and a poor reason offered to account for that difference. For the statute of 3. *Hen.* 7. says, "all writs of error;" and will therefore comprehend all subsequent statutes relating to writs of error. The three precedents of the entries of the judgments cited were of judgments in the exchequer. Now if that Court think themselves obliged to follow, in their entries, the words of this act, then surely they think the act extends to them. As to inconveniencies; the question is not about them, but what the law ... If on writ of error the judgment be reversed, and restitution awarded, it is very reasonable that there should be a recompence, but there is not. It is true, indeed, that in debt a jury will be directed to give the interest in damages; but though this be done in debt, it is never done in other actions. The costs are ascertained by the judgment, as well as the damages; and therefore interest, by parity of reason, ought to be allowed for those; but this is not pretended to. The words of the statute are general, "any writ of error;" yet some cases are resolved out of it: for example; an executor or administrator shall pay no costs at all in * writs of error, though the judgment be *de bonis propriis* (*f*). It may be a question, whether it can be judicially taken notice of, that any interest is lawful. An action of debt will not lie for money and interest (*g*). From whence it should seem, that originally and judicially interest is not to be taken notice of. * [277]

(*a*) Pelford's Case, 10. Co. 115.
(*b*) 3. Salk. 115.
(*c*) 2. Saund. 106.
(*d*) Anonymous, Cro. Car. 145.
(*e*) Dyer, 76.
(*f*) Mich. Term, 5. *Will.* & *Mary*, Gale v. Till, 3. Lev. 375.
(*g*) Seaman v. Dee, 1. Vent. 198. But see the case of Herries v. Jameson, 553.

THE

HOCKOI *against* EBIZSON.

THE COUNSEL *for the plaintiff* replied, that the *quantum* of the interest to be allowed was in the breast of the court; that the act was a remedial law, and therefore ought to have a liberal construction; that though "*damna*" sometimes signifies "costs," yet when joined with "*custagia*" it must have a different signification; and they are distinguished in every *postea*, damages so much, costs so much.

PARKER, *Chief Justice.* No man is sure of making interest of his money: a man cannot always place his money out to his mind: he may lose the principal; and wherever interest is made, a hazard is run; but here is no hazard at all; the rate of interest was very low when this act was made. However, if this were a new case, I should think it highly reasonable, that damages should be given for the delay; the word "costs" in the act seems to me to relate to *vexation*, and "damages" to delay. By the common law, in every action of debt damages are given, *occasione detentionis debiti*, either by writ of enquiry, or by the court. Where a penal sum is recovered, damages are never given. But upon a single bill, even by the common law, damages are given for the delay. This is a key to the statute. Whenever a man is kept out of his just debt, the law implies and supposes a damage. I doubt only by reason of the different practice in the exchequer.

*[278] * Afterwards, in *Trinity Term*,

IT WAS RESOLVED BY THE WHOLE COURT, that the defendant, upon a writ of error brought into the king's bench, should not have interest allowed him, by way of damages, for the sum adjudged due to him, from the time of the first judgment, pending the writ of error. For at the time of making the statute 3. *Hen.* 7. c. 10. which gives the damages upon writ of error, all interest was reputed unlawful; and therefore that statute could not give it. In fact, when interest ran highest, as at ten *per cent.* interest has not been allowed. In writs of error brought into THE EXCHEQUER-CHAMBER, interest is never allowed; and a uniformity in practice is to be wished and endeavoured (*a*).

(*a*) [illegible] recognizance, bail in error in the exchequer-chamber are not liable to pay interest on the judgment between the signing of the judgment in the king's bench and the affirmance of it in the exchequer-chamber; but they are liable to interest due subsequent to the affirmance, [illegible] v. Leroux, 2. Term Rep. 57. Nor will the Court direct the master to include interest in the costs to be taxed, on non-prossing a writ of error returnable in parliament, for want of transmitting. Cumming v. [illegible], 2. Term Rep. 58. But in debt on a judgment affirmed in error, the jury, by way of damages, may give interest upon the sum recovered by the judgment from the time of signing it, where, by the practice of the court in which error is brought, such interest is not allowed in costs upon the affirmance. Entwistle *v.* Shepherd, 2. Term Rep. 78.—See also Bodily *v.* Bellamy, 2. Burr. 1094. Welford *v.* Davison, 4. Burr. 2127. Zench *v.* Langton, Dougl. 723. *notis.*

The

The King *againſt* Tomb. Caſe 140.

THE COURT. If recognizances are eſtreated into THE EXCHEQUER, becauſe not punctually complied with, yet if the party appear and take his trial at the next ſeſſion, he may compound for a very ſmall matter in the court of exchequer; becauſe the effect, though not the exact form, of the recognizance is complied with.

Where recognizances may be compounded after they have been eſtreated.

SECONDLY, That Judges of *oyer* and *terminer* are the proper judges whether recognizances ought to be eſtreated or ſpared. It is for the advantage of public juſtice, that it ſhould be in the power of Juſtices of *oyer* and *terminer* to ſpare the recognizance, if upon the circumſtances of the caſe they ſee fit.

Judges to determine whether they ſhall be eſtreated.

THIRDLY, No inſtance can be produced of any *certiorari* to remove a recognizance for appearance, from Judges of *oyer* and *terminer*; and it would be to take away a juriſdiction that properly belongs to them.

No *certiorari* ever granted to Judges of *oyer* and *terminer* to remove recognizances for appearance.

* The King *againſt* The Inhabitants of Bury-Pomroi. Caſe 141.

A POOR CHILD of the pariſh of *Stock-Fleming* was, by the churchwardens, bound an apprentice to *A.* in that pariſh, and there lived with his maſter two years. Then *A.* removed to the pariſh of *Bury-Pomroi*, but gained no ſettlement; and there the apprentice ſerved out the remaining five years of his time.

An apprentice gains a ſettlement in the pariſh where he ſerves, though bound in another.

THE COURT held, that this was a ſettlement of the apprentice in the pariſh of *Bury-Pomroi*; and that it was not neceſſary that the binding and ſervice ſhould be in one and the ſame pariſh (*a*); and the ſtatute 12. *Anne*, c. . whereby it is declared, that a ſervant can gain no ſettlement unleſs the maſter does, relates only to certificate maſters.

S. C. 2. Conſt, 564. Salk. 533. 8. Mod. 168, 169. 60, 61.

(*a*) See St. Bride's *v.* St. Saviour's, 2. Salk. 533. Walbourn *v.* All Saints, Foley, 150. Rex *v.* St. Olave's Jewry, Stra. 51. Rex *v.* St. Peter's on the Hill, 2. Conſt, 505.

The King *againſt* Weſton. Caſe 142.

THIS was a conviction before juſtices, for the killing of conies in a warren incloſed.

Conviction for killing of rabbits.

IT WAS MOVED to quaſh this conviction, becauſe the ſtatute 3. *Jac.* 1. c. 13. which relates to warrens incloſed, does not give this ſummary way of proceeding by conviction; and the ſtatute of 22. *Car.* 2. c. 25. which authorizes that way of proceeding, does not relate to warrens incloſed. The words of the ſtatute are to this purpoſe: "Foraſmuch as conies are deſtroyed in warrens and "grounds not incloſed, by reaſon the ſame is not prohibited by the "ſtatutes in that caſe provided, which extend only to grounds in-

The King *against* Weston.

" closed; therefore it is enacted, that whoever shall wrongfully " enter into any warren or ground lawfully * used for keeping of " rabbits, though the same be not inclosed," &c.

The Court. The conviction is well warranted by 22. *Car.* 2. c. 25.; for the former was a partial, this a universal law; " into " any warren." This satisfies the preamble. There is a vast difference between the words " not inclosed," and " though not " inclosed;" the former are restrictive, but not the latter. Unless this act extends to warrens inclosed, they would be in a worse case than those not inclosed; because then an offence in the latter would be punishable by the short way of conviction before justices, but not the former.

A second objection was, that the summons is naught, for want of time given to the party to make his defence.

But it was answered, that though the reason of summons and giving time is founded on natural justice, that a person may have an opportunity to make his defence, yet this conviction being founded upon confession of the party, the objection vanishes.

Case 143. Haiton and Others, Assignees, *against* Jeffreys.

Motion for leave to plead and demur; but refused; for demurring is not pleading.

THE COURT was moved for leave to plead a plea, and demur to the declaration, at the same time, upon the 4. *Anne*, c. the words of which are, " That it shall be lawful for any defendant, " or tenant in any action or suit, or for any plaintiff in replevin, " in any court of record, with the leave of the same court, to plead " as many several matters thereto, as he shall think necessary for " his defence: provided nevertheless, that if any such matter shall, " upon a demurrer joined, be judged insufficient, costs, &c."

* [281]

* The Court. The words of the act of parliament are, " that it shall be lawful to plead as many several matters, &c." Now a demurrer is so far from being a plea, that it is an excuse for not pleading. Here you plead, and at the same time pray that you may not plead. The word " matter" imports a possibility that the other party may demur to it: but there can be no demurrer upon a demurrer. This was never attempted before.

There can be no demurrer upon a demurrer.—Salk. 219.

Case 144. Hammond *against* Webb.

Special bail is not required from a plaintiff in error on a bond conditioned to pay so much money to the obligee of another bond, if the obligor did not; for being a [illegible] bond [illegible].

HAMMOND gave a bond to *Patchell*, conditioned for the payment of so much money by *Webb*. *Webb* gave a bond to *Hammond*, conditioned thus: " Whereas *Hammond* has given a " bond to *Patchell*, for the payment of so much money at such a " day, by him the said *Webb*, the condition of this obligation is such, " that if the money be paid by *Webb*, according to the condition " of the said bond, then this obligation is void; otherwise, &c."

An action was brought upon this last bond; and judgment given for the plaintiff; and writ of error was brought.

[illegible] within 3 *Jac.* 1. c. 8.

Salkeld,

SALKELD, *Serjeant*, moved the Court, that upon this writ of error the plaintiff in error should find special bail by virtue of 3. *Jac.* 1. c. 8. which enacts, "That no execution shall be stayed "on any writ of error or *supersedeas*, for reversing a judgment in "any action of debt or contract for payment of money only, "unless, &c." Now here the bond is conditioned for the payment of money only; for the condition, properly speaking, begins at these words, "the condition of this obligation is such;" what went before being only recital. We are therefore within the very words of the act; and if so, I am sure this Court will not construe us out of the meaning of the statute; for this is a remedial law, and ought therefore to have a large and liberal construction. Writs of error are in delay of that * right which the judgment has given the party, and therefore have always been looked upon by the common law with an evil eye. The statute of *Marlbridge* is a penal law; and yet, because a remedial law, it has been interpreted by equity. That act says, "*firmarii non faciant vastum*;" and it has been resolved, that the word *firmarii* should extend to strangers; and that this act extended to waste *omittendo*, though the word is "*faciant*," which literally imports active waste. HAMMAND against WEBB. 8. Mod. 122. * [282]

BRANTHWAYT, *Serjeant*, *for the defendant in error*. This act ought not to be taken by equity, because it is to take away or clog a remedy that the party has by common law. And for this very reason there have been cases ruled, that this statute should not be taken by equity. In the case of *Garret v. Danby* (*a*), an action of debt upon an award held not within the statute (*b*). He mainly relied upon this difference; where the bond is conditioned for the payment of money in discharge of a debt, and where the payment of money is in defeasance of some other collateral matter. *Tout temps prist* must be pleaded, notwithstanding a te 'er, where the money is to be paid in discharge of a debt; but not where the bond is in defeasance of a former bond. This difference is taken *Co. Lit.* 207. *a*. The condition of this bond is the same as a bond to save harmless; which, without doubt, is out of the act (*c*).

PARKER, *Chief Justice*. This bond stands only as a security for damages; it may be discharged, and the plaintiff not pay one penny; there is no difference between this bond and a bond to save harmless; and it is out of the meaning of the act.

* PRATT, *Justice*. The only question is, whether the case be within the meaning of the act; for no matter whether within the words or not. And it seems to me, that the present case, though possibly within the words, is out of the meaning of this act, which is plainly this, that where a recovery necessarily imports a debt due, there this act takes place, but not where a recovery may or may not import a debt due; and the reason is, that delay in the latter case is not esteemed so prejudicial as in the former. * [283]

Adjournatur.

(*a*) Garret *v.* Dandy, 1. Show. 14.
(*b*) Show 14. 2. Keb. 131.
(*c*) 3. Bulst 234.

Nutton

Case 145. **Nutton** *against* **Crow.**

A writ of error directed to "*Thomas, Lord Trevor*, Chief Justice of our Bench, &c." and returned, "The answer of THOMAS TREVOR, *Knight*, Chief Justice within-named, &c." is void. S. C. ante, 170. S. C. Gilb. 104. Salk. 50.

THIS was a writ of error directed to "THOMÆ DOMINO TREVOR. *Capital. Justic. suo de Banco*;" and the return was, "*Respons.* THOMÆ TREVOR, MIL. *Capital. Justic. infra-nominat. &c.* PLACITA *irrotulat. coram* THOMA TREVOR, MIL. &c."

WHITAKER, *Serjeant*, moved to quash this writ of error, because "*Thom. Trevor, Mil.*" the person that returned the record, could not possibly be the same person with "*Thom. Dom. Trevor,*" to whom the writ was directed. In the case of *Orde v. Moreton (a)*, where, though a record before a bishop and seven is a record before a bishop and six, yet the writ of error was quashed, because wrong described. In *Ferrers' Case (b)* it was held, that "HENRY FERRERS, *Knight*," and "HENRY FERRERS, *Baronet*," cannot be intended to be one and the same person. *Lord De La War's Case (c)* was also cited. In the case of *Heydon v. Godsalve (d)*, a writ of error directed to "THOMÆ FLEMING, *Capital. Justic. ad placita*," was quashed, because the words "*coram nobis tenend. assignat.*" were omitted. If it be objected, that there is but one Chief Justice of the common pleas, the answer is, that a writ of error cannot be directed to the Chief
[284] Justice by name * of his office, but it must be by his natural name; and the reason is, because if no return be made to the writ of error, there goes an *alias*, then a *pluries*, and then an *attachment*, which must be directed to him by his natural name. And the case is stronger here, because there is no attachment against the person but the goods of a peer.

SALKELD *contra*. In the case of *Petty v. Hobson (e)*, a commission of *nisi prius* was directed to "FRANCIS HARVEY, *Armigero*, one of the Justices *Dom. Reg. de Banco*;" and the return was, that the trial was before "FRANCIS HARVEY, *Milite*, one of the Justices, &c.;" yet held well; because he might be *armiger* at the time of the issuing out that commission, and *miles* at the time of the trial; and because otherwise all the trials of THE CIRCUIT would be overthrown. As to the case of *Lord De La War*, that was determined wholly upon the pleading. He agreed, from the authority of the Year-Book 38. *Hen.* 6. 1. and *W. Jones*, 346. that *knight and esquire*, and *knight* and *baronet*, could not be one and the same person; but that such a one *miles*, and such a one *dominus*, might be one and the same person. He quoted THE REGISTER, 287. b. where the same person, in the same writ, is called in the beginning of the writ *miles*, and in the latter end of the writ *baro*. He quoted also *Savill's Case (f)*.

(a) Yelv. 211.
(b) Cro. Car. 371.
(c) Dyer, 209. b. under the name of Sir T. West's Case.
(d) Cro. Jac. 341.
(e) Latch, 161.
(f) Cro. Car. 265.

PARKER,

PARKER, *Chief Justice*, with the consent of the rest. The writ of error must be quashed. Names are for the distinguishing of persons. Such a one *miles*, and such a one *dominus*, are two different names, and therefore to be intended different persons. In records and legal proceedings the whole name is to be set forth; and therefore THOM. TREVOR, *Mil.* here in *the placita*, must be intended of such a one *mil.* who was no lord. * As to the cases cited, and the difference taken between them and this, *viz.* that the same person may be both *miles* and *dominus*, but cannot be *esquire* and *knight*, or *knight* and *baronet*, the true distinction is, that where this alteration has been made in the addition, and held good, both the additions have become consistent, by reason of the difference of the times; since he who was *esquire* at the time of the writ directed, may be *a knight* at the return; and so all those cases may remain good authorities. As to *the Register*, it is nothing to the purpose; for the writ is only a direction, that he who at the beginning of the action was *miles* is now become *a peer*, and that the process should hereafter be against him as a peer. That writ does not import, that the same person was, at the same time, both *lord* and *knight* (though that be true), but that he who before was only *a knight* is now *a lord*. As to the objection, that the office ascertains the person, there being but one Chief Justice of the Common Pleas, I answer, that we must not judge by our own knowledge, or the knowledge of anybody else, but by the record. Besides, *Flemming's Case* is a full answer to this objection. The case also of *Rider v. Broderick (a)* is the same with this, and the Court was of the same opinion; but no judgment is entered.

NUTTON *against* CROW.

* [285]

Afterwards, in the same Term, two more writs of error, in the cases of *Fuller v. Davis* and *Alexander v. Symonds* were quashed, for the same reason.

(a) Gilb. 299

Aylwood *against* Woolley. Case 146.

A plea in abatement must go to the whole.

AN ACTION was brought in the court of common pleas upon three several promises: the first for fifty-five pounds; the second for sixty-five pounds; and the third for sixty-five pounds. The defendant pleaded as to part "*non assumpsit*," and as to part in abatement, * thus, *viz.* as to fifty pounds of the first promise, sixty pounds of the second, and sixty pounds of the third, *quòd breve cassetur*, because there were three actions depending in THE COURT OF EXCHEQUER for the same sums. Judgment of *respondeas ouster* given in the court of common pleas.

* [286]

THE COURT of King's Bench, upon error brought, were of opinion, that the judgment in the common pleas was well given; for a plea *in abatement* must go to the whole, and not to part; and the three actions depending in THE COURT OF EXCHEQUER might have been pleaded in bar of the whole.

Case 147. ——— *against* Ormston.

A bill of exchange payable "*to the order of* "*A.*" is the same as if it were payable "*to A. or order.*"

IN AN ACTION brought upon a bill of exchange, made payable "to the order of the plaintiff," the declaration set forth, that the defendant, by his acceptance, became liable to pay it to the plaintiff, *secundum consuetudinem mercatorum.* Upon this declaration there is a demurrer.

IT WAS URGED *for the defendant*, that the plaintiff had only an authority to indorse the bill, and then the indorsee might maintain an action; but that the plaintiff was not entitled to receive the money. It was compared to the case of a devise that executors shall sell land, where the executors have only an authority to sell, but no interest; and therefore immediately upon sale, the vendee is in, not from the executors, but under the will.

ON THE OTHER SIDE *it was said*, that if this was law, a multitude of bills of exchange would be overthrown; that by the custom of merchants there is no difference between payable "*to the order* "*of such a one*," or payable "*to such a one or order*;" and that the

*[287] custom is confessed by the demurrer. * That the same strictness and nicety are not required in the penning of bills current between

Salk. 443. merchant and merchant, as in deeds, wills, &c. In policies of insurance, "warranted to depart with convoy," has been resolved to import a *continuance* with that convoy as long as may be (*a*); and this not *ex vi termini*, but because it is understood in this sense by merchants.

THE COURT. Even in case of land, a grant or devise of the profits of land carries the land. The word "*order*" implies property; there is no difference between having a power to dispose of money and having the money itself. What is an order, but an authority to appoint the payment of it? which the plaintiff here does to himself.

Judgment for the plaintiff.

(*a*) See the case Jefferies *v.* Legendre, 3. Lev. 320. 4. Mod. 58. 1. Shew. 320. Gordon *v.* Morley, 2. Stra. 1265. Victoria *v.* Cleve, 2. Stra. 1250. Hibbert *v.* Pigou, Park on Ins. 339. Lilly *v.* Ewer, Dougl. 72. Taylor *v.* Woodness, Park on Ins. 349.

Case 148. The Parish of Brightwell *against* The Parish of Henley.

A service of forty days under a hiring for a year will connect with an immediately antecedent service under a hiring for less than a year.—S. C. 1. Sess. Cases, 92. S. C. Foley, 198, 143. S. C. 2. Bott. P. L. 417. 1. Stra. 83.

THREE WEEKS after *Michaelmas* a servant is hired until the *Michaelmas* following; and upon the *Michaelmas* following he was hired for a year until the next *Michaelmas*, but did not serve out the year; but his service in both years was above a year.

The

The question was, Whether this was a settlement? For though here was a hiring for a year, and a service for a year, yet it was not a year's service subsequent to that hiring.

THE PARISH OF BRIGHTWELL *against* THE PARISH OF HENLEY.

PARKER, *Chief Justice*, the rest of the Court concurring. It is a settlement; for here is a hiring for a year, and service for a year, though not under that hiring; which was resolved not to be necessary, in the case of *Overton v. Steepleton* (*a*). But if a servant is hired, during a whole year, from week to week (*b*), and is then hired for a year, and serves one week, this is no settlement, for the want of continuance in the service for forty days (*c*) after the second hiring.

(*a*) Fort. 316. S. C. Sett. & Rem. 255. S. C. 3. Salk. 257. S. C. 12. Mod. 224. S. C. Burr. S. C. 549. S. C. 2. Bott's P. L. 415.—See also the same point, Rex *v.* Southmolton, 1. Ld Ray. 426. Rex *v.* Eardisland, 2. Bott. P. L. 423. But the hiring for a year must be made before there is any discontinuance of the former service, Wichford *v.* Bretford, Fort. 311. And for what shall be considered as a discontinuance, see Rex *v.* Fifehead Magdalen, Burr. S. C. 116. Rex *v.* Caverswell, Burr. S. C. 461. Rex *v.* Ellisfield, Cald. 4. Rex *v.* St. Giles's Reading, Cald. 54. Rex *v.* Underbarrow, Cald. 65. Rex *v.* Grendon Underwood, Cald. 359. Rex *v.* Sulgrave, 1. Term Rep. 778.

(*b*) Rex *v.* Bagworth, Cald. 179.

(*c*) But it is now decided, that a settlement may be gained by serving a year under different hirings, if one of them be for a year, although there be not forty days service under the yearly hiring, Rex *v.* Inhabitants of Acton, 5. Term Rep. 98.

*[288]

* Kitton *against* Fag. Case 149.

HAMLIN, a high-sheriff, by a legal instrument, made *Lancaster* his under-sheriff, in trust for *Altham*, who had been under-sheriff the year before; but neither *Lancaster* nor *Altham* took the oaths required by 27. *Eliz.* c. 12.; and after *Hamlin*'s year was expired, and before a new sheriff was appointed, *Altham* made an assignment of a bail-bond.

An *under-sheriff* may, on the statute 4. *Anne*, c. 16. assign a bail-bond in the name of the *high-sheriff*; but a person for whom this office is held in trust, and who has not taken the oaths directed by 27. *Eliz.* c. 12. is not a legal *under-sheriff* within the act.

N. B. *Altham* always acted as under-sheriff, and *Lancaster* not at all.

The question was, Whether *Altham* was such a person as that his assignment of the bail-bond was a good assignment within the statute of 4. *Anne*, c. 16. for the amendment of the law.

S. C. 1. Stra. 60.

MR. ROBINS argued, that this assignment was good. This case is to be resolved into two points. FIRST, Whether it be necessary that this assignment be made by the high-sheriff in person? And, SECONDLY, If it be not, Whether this assignment, being made by *Althum* the under-sheriff *de facto*, be not a good assignment?

As to THE FIRST POINT he argued, that it was formerly a doubt, if the sheriff returned a *cepi corpus*, as he must, notwithstanding by the statute of 23. *Hen.* 6. c. 10. he is obliged to bail him, and has not the body in court at the day of the return, whether he was not liable to an action. The law was not settled in this point until the twenty-first year of *Charles the Second*, when

KITTON *against* FAG.

3. Salk. 314, 315.

it was resolved (*a*), that he is not liable to an action. In the statute of 4. *Anne*, c. 16. for the amendment of the law, though "under-sheriff" is not mentioned, yet he is far from being excluded; he may possibly be included under the words "other "officers." In all ministerial acts, whatever is done by the under-sheriff is of the same authority as if done by the sheriff him-

* [289] self (*b*). * The assignment of bail-bonds to the plaintiff is no new thing; it was a common practice before the statute; and though, in strictness of law, a bond being a *chose in action*, such assignments were not good, yet such assignments have been taken notice of in courts of law, and not suffered to be evaded (*c*). The statute 4. *Anne*, c. 16. is not in nature of an authority to the sheriff, but is a judgment in parliament that the sheriff shall do it, and he is liable to an action if he do not; and in chancery he may be compelled to a specific performance, according to this act of parliament. There were two reasons for making this act of parliament; the one to obviate the abusive practice of sheriffs in releasing these bonds, and thereby cutting off the plaintiffs from the advantage of them, for whose security alone they were taken; and secondly, to remove the chicane of the law, that these bonds were not assignable, because *choses in action*. Had the statute only made the bail-bonds assignable, and not said by whom, the law would have said, that the sheriff was the person to assign it. If the sheriff die before assignment, shall not the executor of the sheriff assign it? As to the objection that may be made, that the circumstances required by the act of parliament to be observed in assigning make it necessary for the sheriff to do it in person, it may be answered, that the reason of prescribing these circumstances was only to make the assignment more effectual; and to distinguish the assignments by virtue of this act from those in use before; and may therefore be compared to fines (*d*). But there was no design to abridge the power of the under-sheriff. An under-sheriff, by virtue of his office, is included in several acts of parliament,

* [290] though not named (*e*). * Execution is the end and life of the law (*f*). This is a mechanical part of the sheriff's office; and *qui per alium facit, per seipsum facit* (*g*).

As to THE SECOND POINT, it is no more than this, whether all acts done by one who appears and acts as under-sheriff should be void for want of some circumstances that none think themselves obliged to inquire into, and concern the under-sheriff only. Though there be an under-sheriff legally appointed, yet he not appearing, nor acting, it makes no alteration at all in the case. A

(*a*) In an Anonymous Case, 1. Vent. 55.

(*b*) Year-Book 8. *Hen.* 4. pl. 20. Hob. 13. 3. Bulst. 77. 9. Co. 48.

(*c*) Foster *v.* Jackson, 22. *Car.* 2.

(*d*) 3. Co. 88.

(*e*) The statute of *Westminster the Second*, c. 11. c. 18.; the 25. *Edw.* 3. c. 17.; and see Fitz. N. B. 266. 4. Co. 64.

(*f*) 5 Co. 92.

(*g*) Cro. Car. 26. Salk. 589.

gaoler

gaoler *de facto* is bound to take care of the prisoners (*a*); and generally the law is so, that acts done by those reputed in authority are good (*b*). If the acts of under-sheriffs *de facto* were void, in so many acts of parliament relating to sheriffs some care would very probably have been taken about it.

MR. REEVES, *contra*, insisted, that the oath to be taken was an oath of office; that *Lancaster* was in a legal manner constituted under-sheriff; but that *Altham* had no deputation at all, but was a mere intruder; that supposing the assignment performed during the year of *Hamlin* might have been good, yet it would not now, being performed after (*c*). He took this difference, that where a statute appoints anything to be done by the sheriff, and prescribes no particular manner for the doing of it, which makes it necessary to be a personal act, there the under-sheriff may do it, though the sheriff only is mentioned; but where the manner and circumstances enjoined and prescribed by the act make it a personal act, there the * under-sheriff cannot perform it; which difference answers all the instances brought from acts of parliament; and he insisted, that the statute enjoining the assignment to be under the hand and seal of the sheriff did make it a personal act. Indeed, in *Englefield's Case* (*d*) it is held, that tendering a ring is no personal act; but then it is resolved, in the *Duke of Norfolk's Case* there quoted, that the uses being revocable by writing under the proper hand and seal of *the Duke*, it was a personal act, and not capable of being performed by anybody else. This case is exactly the same with that at the bar, except the addition of the word "proper," which, according to the case of *Smith v. Wheeler (e)*, makes no difference at all. If the sheriff die before assignment, his executor cannot do it. This is *casus omissus*; and the plaintiff must sue in the sheriff's name, as at the common law before this sta[illegible] 4. *Anne*, c. 16. * [291]

Adjournatur (*f*).

(*a*)
(*b*) 2. Inst 331. Cro. Eliz. 699. Howell's Case, 1 Keb. 357. and Harris v. Jay, Moor, 112. Cro. Eliz. 34.
(*c*) Year-Book 34. *Hen.* 6 3. 6. 1. Roll. Abr. 894. Moor, 112. 757. Yelv. 44. Cro. Jac. 73.
(*d*) 7. Co. 11.
(*e*) 1. Vent. 128. 1. Mod. 40.
(*f*) PARKER, *Chief Justice*, in Trinity Term, 3. *Geo.* 1. said, that he had had the advice of all his Brothers on this case, and that they were of opinion, that an under-sheriff himself might assign a bail-bond in the name of the high-sheriff, it having been the constant practice since the statute 4 *Anne*, c. 16.; but that if the assignment were neither by the high-sheriff nor his under-sheriff, it would not be good: and that being the present case, the defendant had judgment. S. C 1. Strange, 60.

HILARY TERM,

The Firſt of George the Firſt,

IN

The King's Bench,

AT

Niſi Prius,

BEFORE

Sir Thomas Parker, *Knt. Chief Juſtice.*

Reeves *againſt* Symonds. Caſe 150.

On the trial of an action for goods ſold and delivered, a perſon cannot be admitted to prove, that the plaintiff gave the credit to *him*, and not to the defendant.

THIS was an action brought by *Reeves* for a quantity of ſtockings ſold to *Symonds*.

The defence of *Symonds* was, that it was not he that bought the ſtockings, but his ſon, who ſent them to *France* in the way of trade.

To prove this he would have called his ſon.

Parker, *Chief Juſtice.* He cannot be an evidence; becauſe here is an advantage made by way of trade: and to whom this advantage ſhall accrue depends entirely upon this queſtion, Who made this contract? and now one comes to ſwear, that he made the contract himſelf.

* Darnell, *Serjeant.* He may be a witneſs; becauſe he will neither get nor loſe by the event of this cauſe; for what is now given in evidence cannot be given in evidence in another action. * [292]

Parker, *Chief Juſtice.* This you have often ſaid, and I as often anſwered. If an action be brought by a commoner for his right of common, ſhall another perſon that claims a right of common upon the ſame title be allowed to give evidence? No; and yet it is certain that he can neither get nor loſe in that cauſe; for the

REEVES against SYMONDS. the event of that cause will no way determine his right. But though he is not interested in that cause, he is interested in that question upon which the cause depends; and that will be a bias upon his mind. It is not his swearing the thing to be true that gives him any advantage, but it is the thing's being true; and the law does judge, that it is not proper to admit a man to swear that to be true which it is plainly his interest should be true.

Hob. 92.
2. Vern. 375.

EASTER TERM,

The First of George the First,

IN

The King's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*
Sir Lyttleton Powys, *Knt.* }
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Pratt, *Knt.* }
Sir Simon Harcourt, *Knt. Attorney General.*
Nicholas Leclmere, *Esq. Solicitor General.*

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* The Parish of Frencham *against* The Parish of Pepperharrow. Case 151.

A service for a year will not gain a settlement, unless there is also a hiring for a year.

THIS was the case of a settlement; and in the order of the justices the fact was stated specially.

A servant was hired two or three days after *Michaelmas*, to serve until *Michaelmas* next; but he served as many days after *Michaelmas* as made his year compleat, and then received his wages.

S. C. 1. Sess. Cases, 71. S.C. Foley, 144. S. C. Fort. 322. S. C. Sett. & Rem. 56.

DARNELL, *Serjeant*, argued, that this was no settlement; for the Court must take the fact as stated by the justices; and therefore, though the circumstances set forth in the order might have been sufficient to have induced the justices to have found this a fraud, and that the real hiring was for a whole year, yet since they have expressly stated the fact otherwise, and that he was hired three or four days after *Michaelmas*, until *Michaelmas* next, the Court must take the fact for granted; and then there can be no settlement, because there is no hiring for a year, as the law requires.

Adjournatur.

But afterwards, *ut audivi*, it was held no settlement.

* Josselyn

Case 152. * Josselyn *against* Lacier.

A bill, requiring the drawee to pay "*seven pounds a month out of the growing subsistence of the drawer*," is not a negotiable bill of exchange within the custom of merchants; and a promise to pay it *secundum tenorem billæ*, will not support an action.

THIS was A WRIT OF ERROR upon a judgment given in the court of common pleas in an action of *assumpsit*, where the plaintiff declared, that *Evans* drew a bill upon *Josselyn*, requiring him to pay *Lacier* seven pounds every month (the first payment to begin in *December*, about two months after the date of the note) *out of the growing subsistence* of *Evans*, and place it to his account; that *Lacier* carried the note to *Josselyn*, who accepted it, and promised to pay it, *secundum tenorem billæ*; by which acceptance, according to the custom of merchants, he became liable; and that afterwards he refused to pay, &c.

The defendant pleads *non assumpsit infra sex annos*; and judgment was given for the plaintiff, upon which judgment the present writ of error is brought.

S. C. post. 316. S. C. Fort. 281. 1. Wils. 262. 1. Stra. 24.

BRANTHWAYT, *Serjeant*, who was of counsel for the plaintiff in error, owned that the defendant's plea was naught; for the promise being to do an act upon a future day, the plea should not have been *non assumpsit*, &c. but that *causa actionis non accrevit infra sex annos*. But he insisted that the declaration was vicious; for the plaintiff declared upon the custom of merchants, concerning bills of exchange; and yet sets forth such a bill, as in the very nature of it appears not to be a bill of exchange. It is essential to a bill of exchange to be negotiable, which this cannot possibly be; because it is to pay upon a contingency, "out of the "growing subsistence" of *Evans*. If it should be objected, that there is set forth in the declaration an express promise to pay, it may be answered, that this will not help the matter; because a

Ante, 104. Salk. 422.

* [295]

* naked promise, a *nudum pactum*, is not in law a sufficient foundation for an action. There must be a consideration; and the consideration must be particularly set forth in the declaration, that so the Court may judge whether it be sufficient to maintain an action. In the case of *Foster v. Smith (a)* the plaintiff declared, that the defendant being indebted promised to pay; and it was held that the consideration was not sufficiently set forth, for that the plaintiff ought to have specified the cause of the debt; as money lent, goods sold or delivered, &c. In the case of *Frisket v. Mant (b)*, "*paululum tempus* he should forbear," is held not a good consideration; because no certain judgment can be made, what portion of time that is. A consideration of forbearance for a convenient time, will be good; but then there must be an averment how much time he did stay (*c*). In the case of *Wise v. Wise (d)*, in an *assumpsit* by an executor the plaintiff declared, that the defendant being indebted to the testator in the sum of twenty pounds, according to an agreement between them made, promised to pay; and after verdict for the plaintiff, upon *non assumpsit*, the judgment

Salk. 129.

(*a*) Cro. Car. [illegible]
(*b*) By Windham, *Justice*, 1. Sid. [illegible]
(*c*) 1. Sid. [illegible]
(*d*) [illegible] Lev. [illegible]

W[illegible]

was arrested, for want of setting forth this agreement. The case of *Pearson v. Ganell (a)* was strongly insisted upon, as a case in point, to prove that this was not a bill of exchange; and that a declaration upon it, as a bill of exchange, was erroneous. JOSSELYN *against* LACIER.

MR. REEVES, in affirmance of the judgment, argued,

FIRST, That this was a good bill of exchange; for the words "out of my growing subsistence," do either import some interest or effects that the acceptor had of the drawer in his hands, or they are idle and insensible. If the former, then the case is in effect this: *A.* draws a bill upon *B.* requiring him to pay *C.* so much money, out of the money that is in his hands; *non refert* whether *B.* has any money of *A.* actually in his hands; for by his * acceptance, he is estopped from saying the contrary. But if the words are insensible, then they are surplusage. [296]

SECONDLY, He argued, that supposing this not to be a good bill of exchange, there was an express promise laid, and a sufficient consideration to support it. Labour and trouble, &c. are sufficient considerations to support an *assumpsit*, as a valuable one; for almost any consideration, though ever so small, has been held sufficient to support this sort of action (*b*). He insisted, that the drawing the bill was a request and authority to demand the money; and that the trouble the plaintiff was at in demanding the money, was a good consideration.

BRANTHWAYT, *Serjeant*, replied, that the going of the plaintiff to demand the money, was no part of the contract, nor any advantage to the party that made the promise.

Adjournatur (c).

(*a*) 4. Mod. 242.
(*b*) 3. Cro. 77. 1. Sid. 369. 1. Vent. 71. 74.
(*c*) The Court was of opinion, that this was not a good bill of exchange within the custom of merchants; and therefore that the action could not be supported by the promise. S. C. post. 316.

The Queen *against* Blagden. Case 153.

MR. REEVES, *for the defendant*, observed, that if the crown had a right to join issue upon the traverse, yet the issue was here ill joined, because not joined in the words of the traverse, but more narrow and restrictive. The information charges the defendant with using the office, liberties and privileges, franchises, &c. of portreeve of the town of *Honiton*, and the traverse is taken in words as general and comprehensive as the charge; but the issue taken upon the traverse is ABSQUE HOC that he usurped the office generally. Now a man may usurp the office, and not usurp all the privileges, &c. relating to that office. S. C. ante, 212. S. C. Gilb. 6. 145.

Pleading. Whether the crown may take issue upon the traverse?

* As to THE MAIN QUESTION, Whether the crown is at liberty to take issue upon the traverse, or not? the only precedent alledged in behalf of the power of the crown, was that of *The Queen v. Walcourt (a)*; and there the question never received any judicial determination, because the defendant died. As to the case of *Sir Gervas Clifton (b)*, he said, that it appeared from a larger report of that case in *Godbolt (c)*, that it was *nihil ad rem.* In the writ of seisin in *Coke's Entries (d)*, where the other entries are set forth, the traverse is omitted, which proves it immaterial.

Of the difference between informations of intrusion, and those in the nature of a *quo waranto.*

To the objection, that in an information of intrusion, the king may take issue upon the usurpation, though a title be set forth; he answered, that an information of intrusion was of a different nature from this; because *non sequitur*, from his having a title, that he is no intruder; but it does, that he is no usurper. The course of precedents is so in intrusion; but otherwise in this kind of information; which is a presumptive argument that there is a difference. Another difference there is, that in an information of intrusion, the crown sets forth its title, and concludes "*de præmissis, &c.*"

Then he argued, that the allowing the crown to join issue upon this traverse, in their replication, would be inconvenient to the crown, inconvenient to the party, inconvenient to the Court; and *argumentum ab inconvenienti fortissimum in lege.* In the first place, it is inconvenient to the crown; because by this the matter is put [298] at large; the defendant may give anything in evidence; and it amounts, in effect, to the general issue of *non usurpavit (e)*. * All the inconveniencies of allowing general issues will follow upon allowing this. If the king can take issue upon this, he is bound to do it. Where the defendant sets forth his title with traverse, and the king's title is upon record, there the king may either traverse the defendant's title, or he may waive that, and take issue upon the defendant's traverse; but if his title do not appear upon record, then the king is bound to take issue upon the defendant's traverse *(f)*. As to the objection, that no prerogative of the crown is here insisted upon, but only a right common to every subject; it is enough to answer, that THE ATTORNEY-GENERAL would not be content in this case to be bound down by the same rules of pleading that the subject is: the subject could not have avoided taking the issue, but no one will say the crown was bound to do this.—Secondly, This would be inconvenient to the party; because it renders it almost impossible for him to prepare for his defence; for the crown may upon this issue attack his title, or may give in evidence a misuser or forfeiture of his office.—Thirdly, This would be inconvenient to the Court. For the Court cannot tell what judgment to give, without being certified from the Judge that tried the cause, what the nature of the evidence was; for the using

(a) Hilary Term, 23. *Eliz.* Roll. 1.
(b) 3. Leon. 184.
(c) Godb. 91.
(d) Co. Ent. 539, 540.
(e) Heydon's Case, Co. Ent. 372.
(f) Brook. Abr. "Prerogative" 115. Vaugh. 64.

an office without a title, and the forfeiting an office by misusing, require different judgments. THE QUEEN *against* BLAGDEN.

In the last place, he insisted, that the defendant, by setting forth his title, had answered the whole charge of the information, which was for him to shew *quo warranto, &c.*

THE COURT were all of opinion that the defendant should have judgment.

PARKER, *Chief Justice.* Nobody ever thought that "*non* "*usurpavit*" was a good plea; and the reason why it * is not, evidently appears from the nature of the charge, which is for him "to "shew, by what warrant or authority, &c." to which that plea is no answer; and if this could not have been pleaded in bar, then most certainly that replication, which in effect sets up that plea again, must be naught. If "*non usurpavit*" were a general issue allowed in this case, all the rest of the pleadings would be to no other purpose but to lengthen the record. The difference observed by MR. REEVES between the case before us, and an information for intrusion, is very just; for though the defendant should have a title, yet it is very possible he may be an intruder, but impossible that he should be an usurper. * [299] Hob. 127.

POWYS, *Justice*, was of the same opinion. The very reason of joining issues, is that the party may come prepared to defend one single point. In the case of barratry the law is otherwise; but then it must be told what point will be gone upon.

PRATT, *Justice.* I am of the same opinion. For had "*non* "*usurpavit*" been a good plea, every-body would certainly have pleaded it; because by this means THE ATTORNEY-GENERAL would be kept in the dark, and unacquainted with the nature of the defendant's title; and the hazard of setting forth a special title, where the greatest certainty in pleading is required, might be wholly avoided. Besides, the labour of pleading specially is entirely lost, if all may be set aside by a general replication.

Judgment was accordingly given for the defendant.

* [300]

* Muston *against* Yateman.

Case 154.

THE COURT was moved for the plaintiff, by MR. FORTESCUE, in arrest of judgment. Of defects in pleading being aided by verdicts.

Two points considerable.

FIRST, Whether the defendant's plea was not naught? Because it says only, that *Sir Thomas Freke* was seised generally; but does not say, that he was seised *in dominico suo ut de feodo*, which estate only can support a prescription. S. C. ante, 228. S. C. Gilb 305.

SECONDLY, Whether, supposing the plea to be naught for this reason, the finding of the jury had not cured this defect?

 THE

MUSTON *againſt* YATEMAN.

THE FIRST POINT he waived as ſufficiently ſpoken to formerly.

As to THE SECOND POINT he argued, that this defect in the plea was not aided by the verdict, becauſe the ſeiſin was no part of the iſſue; but previous to the uſage, and admitted by the replication, whereby the uſage only was put in iſſue. The general reaſon, why defects in pleading are cured by verdicts, is, becauſe it is to be ſuppoſed, that the verdict could not have been found, unleſs there had been evidence given at the trial of that matter wherein the pleading is defective (*a*). But this not being part of the iſſue, can never be ſuppoſed to be given in evidence. Nay, this is not only no part of the iſſue; but it is not even a neceſſary conſequence of the iſſue, for there might be ſuch a uſage, and yet the party not ſeiſed in fee. Had the jury found a title, that he was ſeiſed in fee, it had been erroneous; or at leaſt it had been a void finding (*b*). The only caſe, where a bad preſcription is held to be cured by a verdict, is the caſe of *Anſly v. Faulkener* (*c*), and that caſe is eaſily anſwered; for firſt, How was it poſſible, that any
[301] finding of the jury could maintain that preſcription, which * the law ſays is naught? And yet that is the caſe there; for there the preſcription was, that the defendant and all the occupiers of the ſaid cloſe, time out of mind, &c.; and this preſcription was by the Court held too general; for a tenant at will, or a diſſeiſor, may be an occupier. And ſecondly, this caſe is denied to be law, in the caſe of *Thorn v. Rookby* (*d*). To the caſe in *Hutton*, 54. quoted when the caſe was ſpoken to before, he anſwered, that there of neceſſity the verdict muſt help; becauſe a grant of a thing being alledged, which in its own nature could not be granted but by deed; unleſs the jury had found the deed, they could have found no grant at all. Then he quoted ſeveral caſes (*e*), wherein it was held, that bad and
Hob. 135. defective pleadings are not aided by verdicts.

SALKELD *for the defendant* inſiſted, that after a verdict, this muſt be intended a ſeiſin in fee. In 1. *Ventris*, 122. it is ſaid by THE CHIEF JUSTICE, that after a verdict, the Court would make any intendment to make the caſe good. The caſe in 1. *Siderfin*, 218. proves that a Court will ſtrain very hard to ſupport a verdict. The queſtion therefore is, Whether "ſeiſin" can poſſibly be intended of a ſeiſin in fee? And without doubt it may; for ſeiſin is the *genus*; ſeiſin in fee, in tail, for life, &c. are the *ſpecies*. The word "ſeiſed" rather imports ſeiſin in fee than any other eſtate; becauſe ſeiſin in fee is the mother eſtate, and all the other particular eſtates begin by contract. In the pleading of a fine it is *ſeiſitus* only; and yet always underſtood to be *de feodo*. Could not the plaintiff have replied, that *Freke* was ſeiſed for life, and have
* [302] traverſed the ſeiſin in fee * *modo et forma*, as by the plea was ſup-

(*a*) 1. Mod. 161.
(*b*) 1. Sid. 96.
(*c*) Cro. Eliz. 446.
(*d*) Michaelmas Term, 9. *Ann.*
(*e*) Hob. 189. Action upon the caſe. 2. Cro. 245. Aſſumpſit. 3. Cro. 479. Caſe. 3. Cro. 515. Debt upon obligation. Styles, 220. Aſſumpſit

poſed?

posed? Certainly he might; for whatever is necessarily supposed in a plea, may as well be traversed as what is expressed (*a*). If this had been traversed, then no question this had been in issue. Evidence likewise might have been given by the plaintiff to shew, that *Freke* was seised for life, and not in fee; and this had made an end of the issue. He likewise took a difference between a defective title in itself, and a title defectively set forth; the former cannot be supported by a verdict, but the latter may. For this purpose he cited, *Dorne v. Cashford* (*b*), *Crouther v. Oldfield* (*c*), *Harrison v. Peck* (*d*), and *Blackford v. Atkins* (*e*). From the verdict found by the jury, it is plain that it must be such a seisin, as that those whose estates *Sir Thomas Freke* had, did time out of mind use such a way, &c. Now this could not be any other seisin but in fee; therefore the verdict has helped the plea.

MUSTON *against* YATEMAN.

Salk. 279.

PARKER, *Chief Justice.* It is as clear as the sun, that unless evidence had been given to the jury of *Sir Thomas Freke's* having an estate in fee, they could not have found such a verdict; and then, according to the rule laid down by MR. FORTESCUE, the verdict has helped the pleading. Seisin in fee, as was supposed in the plea, might have been traversed.

POWYS, *Justice*, concurred with PARKER, *Chief Justice.*

EYRE, *Justice*, doubted.

PRATT, *Justice*, concurred so strongly with PARKER, *Chief Justice*, that he held the plea would have been good, even upon a general demurrer. The word "*seisitus*," *ex vi termini*, no more imports seisin for life, than seisin in fee. It is true that "*seisitus*" alone, shall be intended a seisin for life; but the reason is, because it is a maxim of law, that *verba* * *contra proferentem fortius accipienda sunt* (*f*); and a seisin for life is the most prejudicial seisin to him that pleads it. Therefore if any averment follow in the same plea, that necessarily restrains the seisin to a seisin in fee, upon a general demurrer it is well. And this is the case here; for the subsequent averment, "that he and all those whose estate he had," must be false, unless it were a seisin in fee. And if this be necessarily included in the verdict, as undoubtedly it is, then it is aided by it. The authorities are innumerable.

* [303]

3. Salk. 279.

Adjournatur.

(*a*) Gilbert *v.* Parker, Easter Term, 3. *Ann.* Salk. 629.
(*b*) Easter Term, 9. *Will.* 3. Salk. 363.
(*c*) Hilary Term, 4. *Ann.* Salk. 27, 365. 1. Lutw. 125. 2. Ld. Ray. 1225.
(*d*) Palmer, 420. S. C. Latch. 110.
(*e*) Hobart, 116, 117.
(*f*) Ante, 229. Hob. 242.

Weddal

Case 155. Weddall *against* Manucaptors of Jocar.

Of the difference between pleas of performance, and pleas in excuse.

S. C ante, 267.

Salk. 520.

SALKELD, *Serjeant*, who was Counsel for the bail, in answer to the objection against the plea, that had been made when the case was spoken to last, insisted copiously upon a difference between *pleas of performance*, and *pleas by way of excuse*. Had this been pleaded by way of performance, he owned it would have been naught; but he contended that it was by way of excuse, and therefore well. The only matters that can be pleaded as a performance, to this recognizance, are either rendering the body, or paying the condemnation; but this is none of those; *ergo* a plea in excuse. Had it been a plea of performance, it had been naught; because the issue joined upon it would then, according to the objection, have been material only one way. A plea in excuse, in the very nature of it, implies a non-performance; and it is always decisive and effectual; because the Court will intend nothing in favour of him that pleaded it, but what is contained in the very plea: and therefore the bail having pleaded here, that the principal died *ante emanationem brevis*, by way of * excuse, the Court shall never intend the death of the principal, between the emanation and the return of the writ; so that if at a trial upon this issue there had been evidence that the principal was alive at the time of the emanation of the writ, judgment must have been given for the plaintiff; nor would any evidence have been received of his death between the emanation and return. As for the cases of debt upon bond, and *solvit ante diem* pleaded; they are not parallel, because pleaded as performance (*a*). There is no doubt but "accord "with satisfaction," though before the day, may be pleaded in bar of debt upon bond; and yet the objection will hold equally here, *viz.* that it is possible, that though this plea should be found against the defendant, yet he might pay the money according to the condition of the bond at the day; and therefore the issue joined upon this plea, is material only one way. Now, this is a plea by way of excuse, which supposes non-performance. Pleading is only setting forth that fact, which in law is a good discharge; if therefore the death of the principal *ante emanationem brevis*, be such a fact as in law discharges the bail, certainly the bail may plead it.

* [304]

MR. FORTESCUE *contra*. What is a good discharge may no doubt be pleaded, but then it must be pleaded properly and in due form. The proper way of pleading it had been, that the principal died before the return of the *capias ad satisfaciendum*. So is *Thompson's Entries*, 280. and all the precedents. The end and design of joining issues, is to be final and conclusive, to determine the matter one way, or the other. No issue can be joined on this plea, that can be material both ways; and it is parallel with the cases of *Hill v. Manby* (*b*), *Atwood v. Coleman* (*c*), and *Merril v. Josselyn*,

(*a*) Cro. Jac. 434. Rob. Ent's Pr... ...ac, 196. Yelv. 192 ... Co. Rep ... *Pinnel's Case*. 2 Rolls's Reg. ...

(*b*) [illegible]

(*c*) [illegible]

WEDDALL against MANUCAPTORS OF JOLAR.

v. *Josselyn* (a), where "*solvit ante diem*" was pleaded, and held that the other party had no remedy but by demurring to the plea.

* As to THE SECOND POINT; namely, the objection taken by the Counsel for the defendants to the *scire facias*, that the *scire facias* was brought not only for the costs and damages given against the principal in the original action, but likewise for the nine pounds additional costs adjudged upon the writ of error, whereas it appeared upon *oyer* of the recognizance, that the bail was only bound to pay what was given against the principal in the original action; MR. FORTESCUE answered, * [305]

FIRST, That the word "*prædict.*" should refer only to the hundred and five pounds, and not both to the hundred and five pounds and the nine pounds too.

SECONDLY, That the conclusion *secundum formam et effectum recogn. prædict.* did necessarily tie down the word "*prædict.*" to such damages and costs only, as could be recovered by that recognizance.

THIRDLY, That this fault might be cured by entering a *nolle prosequi* as to the nine pounds, and taking out execution only for the hundred and five pounds. A *scire facias* is in the nature of an action of debt; and therefore to be governed by the same reason. If I demand too much, I may release it; and this release is no falsifying the writ. One may release an ill demand, as well as a good one (b). Hob. 178. Salk. 658, 659.

SALKELD *replied* to this last point, that he never before heard of *nolle prosequi's* being entered upon writs; that he had heard of abridging counts, but never of abridging writs; that this was not only a writ, but a judicial writ, which is the act of the Court, and must have a foundation on which it is warranted.

PARKER, *Chief Justice*. There is, no doubt, a difference between *pleas of performance*, and *pleas of excuse*, in many regards. But the question here is, Whether you can make that time which is immaterial, part of the issue? It seems to be a general rule of reason, as well as law, that circumstances ought never to be put in issue any further than they touch the matter in question; and whatever issue does otherwise is immaterial. * [306]

As to the other point, the word "*prædict.*" must refer to the nine pounds, as well as the hundred and five pounds; because there is no other end or purpose whatsoever that the nine pounds is mentioned, but only that the *prædict.* may relate to it. The words "*de placito prædict.*" must relate to both pleas, or else it is uncertain to which. A *scire facias* is a judicial writ, founded upon record; and therefore if a writ issue out, not warranted by the record, it must be quashed.

(a) Post 14[illegible]. 8 Mod. 316. 1. [illegible] Inledon v. Crips. Styles, 175.
(b) Hobart, 133. Michaelmas Term. Thetford. Lievium. 233.

PRATT,

WEDDALL *against* MANUFACTORS OF JOCAR.

PRATT, *Justice.* I did, upon the first argument, think the plea naught; now I am somewhat doubtful. There is no doubt but the defendant might have pleaded, that the principal died before the return of the *capias*; but since he has pleaded more to his disadvantage, I doubt he must prove his excuse, in the same way that he has pleaded it. Though this or that particular day is immaterial, yet time is material; and the pleading of the death of the principal generally, without confining it to some time, would not have been good. Since therefore it was necessary for him to confine it to some time, and he has confined it to this time, though this be a narrower portion of time than what he was obliged to, yet, since it is his own excuse, he must stand and fall by it; and the Court will not intend a fact in his favour, which he neglected to plead. Suppose a bond of a hundred pounds, conditioned for the payment of fifty pounds, the defendant pleads twenty pounds paid in satisfaction, and upon the trial of the issue, it appears that ten pounds were received in satisfaction, the verdict must go against the defendant; and yet the sum of ten pounds, received in
* [307] satisfaction, is as good a discharge in law, as the sum of twenty pounds; but being a plea in excuse, he is bound to prove it, as he pleaded it.

PARKER, *Chief Justice.* A difference in the sum varies the accord, but so does not a variation of time. Suppose a bond, conditioned for the payment of money before such a day, and the defendant pleads that he paid the money such a day, according to the condition of the bond; and suppose, upon evidence, the fact comes out thus; that the money was paid after the day he pleaded payment upon, but before the day mentioned in the condition of the bond; and this is found specially, What is to be done? If it be once laid down as a principle, that whatever is pleaded by way of excuse, is necessary to be proved, and part of the issue, then my brother PRATT is right.

PRATT, *Justice.* If a person has judgment to recover two distinct sums, and being sensible that he has a right only to one, he releases the other, and takes out execution for the one only, can this judgment be reversed? and yet the judgment is the act of the Court. But here the *scire facias*, though it be the act of the Court, yet is not purely the act of the Court, but grounded upon the prayer of the party. MR. FORTESCUE has cited no precedents; but I see nothing in the nature or reason of the thing, why a *nolle prosequi* may not be entered as to the nine pounds.

Case 156. **The King *against* Gully.**

An order for maintenance of a poor relation must state, that the party was unable to work.—S. C. Sett. & Rem. 70. S. C. 1. Sess. Cases, 90.

AN ORDER OF SESSIONS, ordering the father to pay so much a week towards the maintenance of his daughter was quashed, because it was not set forth in the order, that she was unable to

work,

work, without which the justices have no jurisdiction. But * by "unable to work," the act means a person not able by work to get his own living; and not a person that is able to get nothing at all (a). The King against Gully.

Another exception was taken to the order; and that was, that this allowance was to be paid "until further order;" whereas it should have been, "as long as the father continued able to allow, and the daughter poor and unable to work." An order of maintenance "until further "order," is good.

But this exception was over-ruled.

(a) See Rex v. Hyworth, 1. Stra. 10. S.C. 534.

The King *against* The Bishop of Meath and Others. Case 157.

THIS was a writ of error, upon a judgment in a *quare impedit*, out of *Ireland*.

There were two exceptions taken to the writ of error, by the Counsel for the defendant in error.

The first was, That the return to the writ of error was, by "Richard Cox, *Mil.*" and not "*Capital. Justic.*"

Salkeld, *Serjeant*, in answer to this, quoted several *Entries* (a), in some of which no "*respons.*" at all; but only "*record. et process. de quibus, &c. sequuntur in hæc verba*;" in some the name of the Judge "*infra nominat.*" and no more; and produced in court several precedents of returns to writs of errors out of *Ireland*, in the very same manner as in the principal case.

He urged, that whenever any record came into court, the time for debating whether the record was returned by a proper officer, was the first Term; for if it remain a Term undisputed, it must be taken for granted that it was returned by a proper officer. No officer but a sheriff, and that by the statute of *York*, is obliged to set his name to the return. * The returning of a record by a Judge of an inferior court to a superior court, is not a judicial act, but a ministerial one. [309]

The second was, That the writ of error was *quid cum, &c. per breve regium de quare impedit*; whereas the words of the writ are, *quod permittat ipsum præsentare, &c.* and there is no such writ as *quare impedit*.

Salkeld, *Serjeant*, answered to this, that *Bracton* (b) distinguishes between the writs of *quod permittat* and *quare impedit*. That *quod permittat* was either an antiquated writ, or taken away

(a) He quoted Coke's Ent. 215. 228. 231. 244. Pla. 6. 218. Pla. 8. 249 Pla. 9. 252. Pla. 11. [illegible]

(b) Bract. 246, 247.

THE KING against THE BISHOP OF MEATH AND OTHERS.

by some old statute now lost, and he cited the statute 13. *Edw.* 1. c. 5. and *Maynard* (*a*), to prove there never was such a writ as *quod permittat*. In all judicial records it is called a *quare impedit*; so also in writs of inquiry; so also in writs to the bishop *de Cler. admittend.* (*b*). The books called *Officina Brevium* (*c*) and *Thesau. Brevium* (*d*) call it a *quare impedit*; and so do many statutes. If now in statutes, and in judicial records, it is known by the name of *quare impedit*, why may it not in writs of error?

THE SERJEANT then went on to take exceptions to the original record.

Hob. 163.

FIRST, Though in a *quare impedit*, both the plaintiff and the defendant may be actors, that must be understood when both are out of possession; for when the defendant is in possession, the plaintiff cannot recover unless he make a title, and the defendant is not obliged either to make a title or become actor.

* [310]

SECONDLY, In a *quare impedit* the plaintiff must set forth both *seisin* and *vacancy*; but here he has failed in both. * As to seisin, the declaration stands thus, "*seisitus fuit et inadvocatione ecclesiæ*;" here the "*et*" couples nothing, and "*seisitus*" refers to nothing. As to the vacancy; the record is thus, "*ecclesia præd. vacavit per* "*cessionem, &c.*" Now this is pleading a consequence, without setting forth the act, of which this is a consequence; it ought to have been pleaded thus, that the parson was made a bishop, or advanced to a living incompatible, &c. as the fact was, *per quod ecclesia præd. vacavit.*

THIRDLY, The conclusion is, "*et hoc paratus est verificare,*" instead of "*inde producit sectam,*" and so no suit before the Court. This is not mere matter of form.

FOURTHLY, That the *venire* was returnable upon a day certain; whereas in a *quare impedit* it ought to have been returnable upon one of the common return days (*e*). This therefore is a discontinuance; and not helped by the statute of Jeofails, because the king is party (*f*).

MR. DENTON *contra.*

FIRST, As to the objection about seisin, the word "*et*" may be left out, or transposed thus, "*et de feodo et de jure.*"

SECONDLY, As the objections concerning the vacancy, and the *paratus verificare*, admit of this answer, that advantage might possibly have been taken of them by demurrer, which advantage is lost by taking issue.

THIRDLY, As to the *venire*; it was answered, that there are two *venire*'s, and to the first there is an entry of *vice-comes non*

(*a*) Maynard's Edward the Second, in Mich. 10. *Edw.* 2. folio 300.

(*b*) Rastal Ent. 502. pl. 1. 2. 4. 5. 8. 12. and Rast. Ent. 507.

(*c*) Off. Bre. page 9.

(*d*) Thes. Bre. page 1.

(*e*) Noy, 120.

(*f*) Tutchin's Case, Salk. 51.

misit

misit breve, and the second is returnable upon a common return day. THE KING *against* THE BISHOP OF MEATH AND OTHERS.

THE COURT. The objection of the seisin is the strongest; for it is nonsense at present, and every thing may be cured by leaving out and putting in. Possibly in transcribing the record, "*de*" was omitted; and if the fact be so, it * may be set right by a *certiorari*. "*De et inadvocatione*" would be well. * [311]

As to the omission of the *inde producit sectam*, this would have excused the defendant in not answering; but in fact he has answered it.

As to the calling of the writ *quare impedit*, instead of *quod permittat*; the fact is, that there was formerly a writ of *quare impedit*, now out of use; and the writ *quod permittat*, is now erroneously called by the name of *quare impedit*. This error has prevailed in judicial writs, and acts of parliament; but never yet in writs of error. However, it being become now a legal name, the writ of error ought not to be disallowed for using of it.

As to the objection to the return of the writ of error, it seems to be wrong. *Capital. Justic.* without his name, or RICHARD COX *infra nominat.* had been well: however, since several writs of error from *Ireland* have been returned in the very same manner, this ought to be allowed.

As to the objection about pleading the vacancy; it ought to have been pleaded as brother SALKELD would have had it; but the vacancy is admitted, by their pleading a presentment under it.

Adjournatur.

Stafford *against* Forcer, Administrator of William Moore. Case 158.

THIS was AN ACTION UPON THE CASE, upon several promises. As to the second promise, the plaintiff declared in this manner, that *William Moore*, the intestate, gave a note to him the plaintiff, bearing date the first of *December* 1704, and reciting, that whereas *Stafford* had, at the special instance of the intestate, lent to * *Augustin Moore*, brother of the intestate, the sum of one hundred pounds, and whereas the said *Augustin Moore* had given his bond for the repayment of the same, upon the second of *June* following with interest; and for further security had given a warrant of attorney to confess judgment upon the said bond; the said intestate promised, if the said *Augustin Moore* did not repay the same with interest, upon the second of *June* following, pursuant to the condition of the bond, that then he would pay the same with interest. Ayers, &c.

In a declaration on note, dated 1st of *Dec.* 1704. Stra. 21.

* [312]

To

STAFFORD *against* FORCER, ADMINISTRATOR OF WILLIAM MOORE.

To this the defendant pleads *causa actionis non accrevit, &c.* (a). Verdict for the plaintiff.

IT WAS MOVED *in arrest of judgment*, that notwithstanding the jury had found for the plaintiff, he could not have judgment; because it appears upon the face of the declaration, that the cause of action did accrue above six years before the death of the intestate; for the cause of action accrued from the second of *June* following the first of *September* 1704.

IT WAS URGED in answer, that the Court should take notice of the common practice of not putting bonds in suit while the interest was duly paid; that this was the case here, that the obligor did for some time duly pay the interest; and this moved the jury to find as they did, for it was contended that the cause of action did not arise until the obligor made default in payment of interest.
*[313] * It was urged, that the note was only the form of the promise, and evidence of it; and therefore if a promise made without a note be capable of continuance, a promise by note must be so too. In 1. *Ventris*, 191. it is held, although it did appear by the declaration that the cause of action did arise above six years, &c. that yet the defendant should not take advantage of it without pleading it. In
Ante, 251, 252. *Raym.* 86. the plaintiff declared as executor, upon a promise thirteen years ago; and *non assumpsit infra sex annos* was pleaded, and on replication, *assumpsit, &c.* issue was joined, and verdict and judgment for the plaintiff; for though the replication was a departure from the declaration, the defendant should have demurred to the replication, instead of joining issue. Here the declaration aided by a verdict.

THE COURT. There is a difference between declarations upon *a parol promise*, and *a promise by note*; in the former, the day is not material, in the latter it is. The issue here is upon a promise by this very note; and therefore impossible in the nature of the thing, that an evidence of a subsequent promise, or a subsequent note, can prove a promise by this note. As to the common practice of not putting a bond in suit, until the interest, &c. the answer is, that default of paying the interest would never give a cause of action, unless there were one before. According to this note, upon the non-payment upon the second of *June, causa actionis accrevit*. A verdict will cure anything that a verdict can cure; but not where upon the declaration it manifestly appears, that no evidence whatever can maintain the issue. Formerly it was held, that the parties should not take advantage of the statute of Limitations without pleading it. But now the law is otherwise. The
* Salk. 28. case of *Dean v. Crane* (b) was to this purpose: there was a promise to the executor within a year before the action brought;
*[314] but the issue joined was, whether the * promise was made to the testator within six years before the action brought; verdict for the

(a) The plaintiff replied a bill filed in the twelfth year of *Queen Anne*. 1. Stra. 22.

(b) 1 Salk. 28.

plaintiff;

plaintiff; it was moved in arrest of judgment, that it appeared upon the face of the declaration, that the testator was dead above six years before the bringing the action; and therefore, &c. *Lord Chief Justice* HOLT was of opinion, at first, that the verdict had cured it; but afterwards it was resolved, by the opinion of all the Judges, that this was a defect impossible for a verdict to cure. In the case of *Heylin v. Huskins* (*a*) there was a question, Whether a bare acknowledgment of a debt amounted to a new promise? and it was resolved that it did not. But in that case there was an express promise, upon which the plaintiff declared, *viz.* "I deny that "I owe you anything; prove it, and I will pay you."

STAFFORD against FORCER, ADMINISTRATOR OF WILLIAM MOORE.

1. Salk. 29.

The judgment in the principal case was arrested.

ANOTHER OBJECTION was taken, that here bringing of the action for the interest, as well as the principal, vitiates the whole. 2. *Rolle's Rep.* 47. a.

Interest of money.

PARKER, *Chief Justice.* As to the interest, we are upon an express promise; and an express promise to pay interest, or money won at play, will support an action.

(a) 1. Salk. 29.

EASTER

EASTER TERM,

The First of George the First,

IN

The Court of Chancery.

Cowper, *Lord Chancellor*.
Sir John Trevor, *Knt. Master of the Rolls*.

Champney *against* Champney. Case 159.

IN a marriage settlement, a power was lodged in trustees to raise three thousand pounds for a daughter, to be paid to her at the age of twenty-one years, or day of marriage, which should first happen, when *Champney* and his wife should die without issue male; and in the mean time a hundred pounds a-year to be paid her for her maintenance. Portions. Marriage settlement. Construction of it.

Cowper, *Lord Chancellor*, resolved, upon the authority of the *Duke of Southampton's Case (a)*, that the words "when *Champney* and his wife should die without issue male," amounted to a *condition precedent*; and that the time of raising the portion, did not commence when one of them should be dead without issue male, and so the other be tenant in tail, *après possibilité d' issue extinct*, but when both of them should be dead without issue male.

* Resolved, That "the mean time" in which the hundred pounds a-year was payable for a maintenance, must necessarily relate to the intermediate time between the raising the money and her attaining the age of twenty-one, or day of marriage. * [315]

(a) 2. Freeman, 186. 1. Vern, 338.

EASTER

EASTER TERM,

The First of George the First,

IN

The King's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Pratt, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*
Nicholas Lechmere, *Esq. Solicitor General.*

Temple *against* Welds.

Case 160.

Money deposited on a wager, in the hands of a stake-holder, becomes the property of the winner the moment the wager is decided.

AN ACTION of *indebitatus assumpsit* was brought for money received by the defendant to the plaintiff's use.

Upon evidence the case came out thus:

The plaintiff and another laid a wager; the defendant held the stakes; the plaintiff brought evidence that he had won the wager.

BLENCOWE, *Justice*, who tried the cause, was of opinion that the plaintiff had mistaken his action; because this money could not, at the time of the action brought, be said to be money received to the plaintiff's use, since the defendant was not to pay the money, until the wager was proved to be won; and the plaintiff was nonsuited.

The plaintiff now moved to set aside his own nonsuit; because it was occasioned by the Judge's mistaking the law.

THE

TEMPLE against WELDE.

THE COURT. The action is well brought; for upon the wager won, the money was actually the plaintiff's, though he could not receive it before the fact was made appear.

Sed adjournatur.

*[316]

Case 161. Betts, Executor of ——, *against* Mitchell.

If a promissory note be given to A. as executor of B. yet he need not, in an action on this note, name himself executor, and therefore he cannot join in the same declaration the promise made to himself with other promises made by the drawer of it to the testator.

ACTION UPON THE CASE was brought for several promises made by the defendant to the testator. As to the fifth promise; the plaintiff declared, that the defendant, on the thirteenth day of *August* 1713, made a promissory note to him as *executor* of such a one, payable to the * plaintiff or order; and then concluded, that the defendant, not minding his promise, did not pay, &c.

To this declaration the defendant demurred.

IT WAS INSISTED upon, that this fifth promise was of such a nature, as could not be joined with other promises made to the testator. For though the note is made to him *as executor*, that is only a description of his person. The note is payable to the plaintiff or order; and by virtue of the statute concerning promissory notes, it is transferrable by indorsement; and the indorsee might maintain an action. It is as much a new contract, as if a bond had been given to the plaintiff for this money. The defendant cannot plead to this note "*plene administravit*;" but must plead *non assumpsit*. The plaintiff might have brought an action upon this note, without naming himself *executor*. This note will go to the administrator of the executor, and not to the administrator *de bonis non*, &c.

THE COURT was clearly of this opinion, and gave judgment for the defendant *nisi (a)*.

(a) See Cockerill v. Kynaston, 4. Term Rep. 280.

*[317]

Case 162. Josselyn *against* L'Acier.

A bill requiring the drawee to pay so much "out of the "growing subsistence of the "drawer," is not *a bill of exchange*; and a promise to pay it *secundum tenorem billæ*, will not support an action.

S.C. ante, 294.

S.C. Fort. 281. 1. Stra. 24. 1. Wils. 262.

PARKER, *Chief Justice*, delivered the opinion of THE COURT.

In this case, two points are considerable: FIRST, Whether this be a good bill of exchange? WE ARE ALL OF OPINION, that it is not a bill within the custom of merchants; it concerns neither trade nor credit; it is to be paid out of the growing subsistence of the drawer; if the party die, or his subsistence be taken away, it is not to be paid. * It may be never paid, and yet his credit unimpeached; it is not payable "*to order*," nor "*for value received*." It does not appear, whether the party that is to receive it, is to receive it upon account of a former debt, or is to receive a bounty.

As

As to THE SECOND POINT, viz. Whether if the bill, by custom of merchants, is not a good bill of exchange, it may not be supported by the promise? ALL OF US ARE OF OPINION that it cannot. For as to that matter it stands thus, *quorum præmissorum ratione*, &c. and *in consideratione inde* he promised to pay, &c. The word "*inde*" plainly refers to the bill, as supported by the custom; and consequently if that fails, the consideration must do so too.

Jossey against L'Acias.

The judgment was reversed.

MICHAELMAS TERM,

The Second of George the First,

IN

The King's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Pratt, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*
John Fortescue Aland, *Esq. Solicitor General.*

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*[318]

* Dorset *against* Chaplin. Case 163.

WRIT OF ERROR out of the court of common pleas. The error assigned was, the want of an original.

Though after a verdict, want of an original is, yet an ill original is not, aided by statute of Jeofails.

Upon a return to a *certiorari*, directed to the *custos brevium*, it appeared, that the original was a *quare clausum fregit*.

IT WAS URGED, that this is an improper *original* for an action of debt. And though after a verdict, the want of an original is aided by the statute of Jeofails, yet an ill original is not aided.

5. Co. 37. Salk. 267.

TO THIS *it was answered*, that a *quare clausum fregit* is no original in an action of debt; and therefore the case is to be considered as if there was no original at all.

TO THIS *it was replied*, that the certificate from the proper officer, was the only way of trying what the original in the action was; and he has certified, that a *quare clausum fregit* was the original; and this certificate the Court is bound to give credit to (*a*).

(*a*) Cro. Jac. 108. 479. Cro. Car. 272. 281. Noy, 4. Yelv 108. 1. Brownl. 96.

DORSET *against* CHAPLIN.

* THE COURT was of the same opinion, and would have reversed the judgment, because of an ill original.

But MR. REEVES desiring to speak to it,

Adjournatur.

Case 164. Leeds *against* Carlton.

If a person sue in the spiritual court for a matter which, upon the face of the proceedings, is out of its jurisdiction, yet on judgment against him by default, on a declaration in prohibition, the jury, on a writ of enquiry, can only give damages for the proceedings subsequent to the issuing of the prohibition.

A MAN sues in the spiritual court for a matter, which, upon the face of the libel, appears to be of temporal conusance, and obtains a sentence. The defendant appeals first, and then sues out a prohibition. In the declaration upon that prohibition, and process thereupon, there is judgment against the defendant, by *nil dicit*; and writ of inquiry of damages awarded.

It was now debated, whether damages were to be given by the jury upon the writ of inquiry, for the proceedings in the spiritual court, from the beginning of the suit in that court; or only for the process in that court, subsequent to the delivery of the writ of prohibition.

WHITAKER, *Serjeant*, contended, that the plaintiff in prohibition was to have damages in this case, for all the proceedings in the spiritual court, from the beginning of the suit; because the matter appearing upon the face of the libel to be of temporal, not spiritual conusance, that was in point of law a prohibition to proceed; and their proceeding at all was both an injury to the party, and a contempt to the crown. He laboured to maintain this difference, that where the matter was originally of spiritual conusance, and became temporal only *propter defectum triationis*, there damages were to be recovered only for proceedings after a prohibition; but that where the matter was originally of temporal conusance, there the law was itself a prohibition; and to this purpose he quoted 2. *Inst.* 299. *Fitzherbert Abr. pl.* 15. *tit. Prohibition. The Year-Book* 9. *Hen.* 6. *pl.* 56. *Cro. Car.* 559. *W. Jones*, 447.

* [320] * DARNELL, *Serjeant*, on the other side. This is a declaration upon a prohibition in the common form. The chief thing complained of, is proceeding in contempt of the prohibition delivered. The jury upon the writ of inquiry are to inquire *de præmissis*, viz. the thing complained of in the declaration, which is the contempt of the prohibition. Were the law as *Serjeant* WHITAKER would have it, the plaintiff should have declared in another manner. Possibly in a declaration upon a prohibition, setting forth, "WHEREAS all causes, unless testamentary or matrimonial, are "of temporal conusance, &c. that yet, &c." as in *Rastall's Entries*, 485. the law may be with them; and yet in these very cases, issue is often joined upon this very point, *viz.* proceeding after prohibition delivered, &c. For the sheriff to take upon him to judge what things are of spiritual, and what of temporal conusance,

would

would be a thing of a dangerous nature; and yet this must be the consequence, if, &c. Lesby against Carlton.

Parker, *Chief Justice*, was of opinion, that damages were to be given only for the proceedings in the spiritual court since the prohibition delivered. This is a special action for proceeding in contempt of the prohibition; this is the very gist of the action; upon this issue is constantly joined, which, according to what is now contended for, must be an immaterial issue; for if the issue be found with the defendant, that he has not proceeded after the prohibition delivered, yet if he had proceeded at all, the plaintiff must have judgment for his damages. Nay, according to this doctrine, the very pleading this plea, in this sort of action, is very impertinent; and upon doing which, the plaintiff may sign his judgment; for he ought not to plead, "that he did not proceed after prohi-"bition, &c." but "that he did not proceed at all." * No action lies against a man for suing in the spiritual court, where he has no right. Prohibition is to the Judge, not to the party; and in this case, this not a prohibition to the first Judge, but to the Judge upon the appeal. A further circumstance of the unreasonableness of what is asked for, is, that the party desires to have his damages, for the charge, process, and delay occasioned by his own appeal. In a prohibition, two things are to be considered: First, Whether the party is to be punished? Secondly, Whether he is to be estopped? His not proceeding after the prohibition delivered, prevents his punishment, and excuses him from contempt; but cannot hinder the plaintiff of his judgment. If upon this issue, whether the defendant did, or did not proceed after prohibition delivered, verdict be found for the defendant, no costs is ever given. The late statute about giving costs was unnecessary, if this doctrine had been true. * [321]

And of this opinion was the Court.

But Pratt, *Justice*, hesitating, the case was adjourned.

The King *against* Darrel. Case 165.

Upon a trial at bar for compassing the death of the king, it was debated, Whether a promise of pardon did not disable a man from being a witness?

A promise of a pardon does not disable a man from being a witness.

The Court resolved, that this was an objection never allowed, and of no weight. Treason and such like crimes are not to be discovered but by the accomplices, who will never be prevailed with to give evidence, but in expectation of a pardon. Several acts of parliament have encouraged the discovery of crimes, by the promise of a pardon. As to * the opinion, in *Keyling*, of Lord Chief Baron Hale to the contrary, he was over-ruled by the rest of the Judges. * [322]

Conspiring to levy war, is an overt act of compassing the death of the king.

THE COURT resolved, that a conspiring to levy war in order to dethrone the king, which is the civil death of the king, is an overt act to prove the compassing the death of the king. But that a conspiring to levy war generally, is not an overt act to prove the compassing the death of the king; because there may be such a levying war as may be treasonable, without any intention of deposing the king; as pulling down inclosures, bawdy-houses, &c. The opinion of KEYLING, *Chief Justice* (*a*), as opposed to LORD COKE (*b*), was held for good law.

(*a*) Kely. 20 (*b*) 4. Inst. 6

HILARY TERM,

The Second of George the First,

IN

The King's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Pratt, *Knt.* } *Justices.*
Sir Edward Northey, *Knt. Attorney General.*
John Fortescue Aland, *Esq. Solicitor General.*

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* Baldwin *against* Church.

Case 166.

WRIT OF ERROR out of the court of common pleas.—The original action was an action of debt for twenty pounds, against two executors. The one pleaded *plene administravit* as to all the assets in his hands, *præter* forty shillings, and concluded *quare actio non*; the other pleaded *plene administravit* generally. The plaintiff demurred generally to both pleas, and judgment was given in the court of common pleas for the defendants, and a writ of error brought.

If one of two executors plead *plene administravit præter* 40s. and conclude in bar; and the other plead *plene administravit* generally; the first plea is bad.

MR. YORKE *for the plaintiff in error.* If a man take upon him to plead to the whole, and then plead such a plea as goes but to part of the action, the plea is bad for the whole. A plea is in its nature intire, and cannot be good in part, and void or bad for the rest. The defendant has here pleaded, in bar to the action, such matter, as amounts to a confession of the cause of action; and consequently, that the plaintiff should have recovered. The defendant should in this case have confessed the cause of action, that he had assets

S. C. 1. Stra. 90.
Rolle's Ab. 928. pla. 5.
Rastal, 309. b. pla. 9.

 unadministered

Baldwin against Church.

unadministered * to such a value, and was ready to pay, as far as his assets would enable him. The plaintiff had good cause of demurrer, if one of the defendants pleas be ill; and the court of common pleas ought not to have given judgment for the defendants. The same judgment is to be given by this Court, as the court of common pleas ought to have given against both defendants; and that judgment ought to have been against both defendants *de bonis testatoris*, and *de bonis propriis* of that executor that pleaded an ill plea, as to damages and costs. For each executor has by law an interest in, and power over the whole estate; and therefore it is, that the plea of each executor shall bind the estate of the testator. If it be objected, that the plaintiff has committed a mistake in his demurring, by using the word "*placitum prædictum*" in the singular number; it may be answered, that "*placitum*" is *nomen collectivum*, and to be taken *reddenda singula singulis*, according to 1. *Saunders*, 338 *(a)*.

Salk. 262.

Salk. 219.

The Court. The judgment must be reversed; and the same judgment given here, as should have been given in the court of common pleas. The plaintiff must take care to take his judgment rightly. The plea is undoubtedly ill; for it sets forth such matter as shews plainly, that the plaintiff has good cause of action, and yet concludes *quare actio non*, which imports, that the plaintiff should not have brought this action at all. If a man bring an action of debt for twenty pounds, and the defendant plead, that he has paid forty shillings, and conclude *quare actio non*, it would be bad; and yet here the plaintiff might have brought his action for the eighteen pounds only; whereas in the case of an executor, the creditor must bring the action for the sum, the debt that is really due, let the assets be never so small. * The reason why, though the

* [325]

assets be very small, yet judgment must be for the whole debt, seems to be for the preventing a fresh action, in case of more assets *(b)*

(*a*) Cases quoted *arguendo*, 1. Roll. Abr. 805. 928. The Year-Book 7. *Edw.* 4. fo. 8.; the 9. *Edw.* 4. fo. 13.; the 21. *Hen.* 6. 45. Dyer, 210. Cro. Eliz. 318. Cro. Car. 167.

(*b*) It is said, that the judgment of the common pleas was reversed, and a new judgment given by the court of king's bench for the plaintiff against one of the defendants only. See Elwell *v.* Quash and Others, 1. Stra. 20.

Case 167. Taylor *against* Matthews.

If a plaintiff die, pending consideration of the Court, judgment may be entered without continuances.

IF, pending the consideration of the Court, the plaintiff die, judgment may be entered without entering the continuances; and then it will have relation to the *day in bank (a)*. A conti-

(*a*) See the case of Sir Ambrose Farnel *v.* Tipper, Latch, 92. Isley's Case, 1. Leon. 187. Lure *v.* Rest, Ante, 39. and Ballard *v.* Delandez, 2. Stra. 785. Cases Temp. Hardw. 205.

nuance

nuance is nothing but a "*Curia advisare vult.*" Though the time when in fact the judgment was given, must be entered on THE ROLL, that is only in respect to land, that it may not be bound until the time of the judgment given, and so purchasers over-reached. Before this inconvenience was provided against by the statute 29. *Car.* 2. c. 3. there might have been an inconvenience in entering judgment without continuances; there can be none now.

TAYLOR against MATTHEWS. Salk. 401.

EASTER

EASTER TERM,

The Second of George the First,

IN

The King's Bench.

Sir Thomas Parker, *Knt. Chief Justice.*
Sir Lyttleton Powys, *Knt.* } *Justices.*
Sir Robert Eyre, *Knt.*
Sir John Powell, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
John Fortescue Aland, *Esq. Solicitor General.*

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*[326]

* Herson *against* Aglionby. Case 168.

THE PLAINTIFF brought a writ of error to reverse a common recovery; and the defendant moved for liberty to *plead double.*

On a writ of error to reverse a common recovery, the defendant in error may, by the leave of the Court, plead double.

The motion was opposed, because the statute 4. & 5. *Anne*, c. 16. for the amendment of the law, whereby a defendant, by the leave of the Court first obtained, may plead double, was not to be understood of a defendant in a writ of error, but a defendant in an original action.

Co. Lit. 304. Hob. 295. Fort. 336. 1. Wilf. 223. 5. Com. Dig. "Pleader" (E. 2.).

THE COUNSEL *for the motion* insisted, that this statute extends to the defendant in a writ of error as well as to the defendant in an original action; that the one might have as great occasion of pleading double as the other; that it had lately been resolved, that a writ of error did not abate by the death of one of the plaintiffs, whereas, as the law stood before that act of parliament, it would; that by the same reason by which the word "plaintiff" in that part of the act of parliament was to be extended to a plaintiff in error, the word "defendant" should likewise. * It was further urged, that the pleading double was at their own peril; for if the Court had not power, by this act of parliament, to grant them leave to plead double, the other side may demur. *[327]

THE

Mason against Hasonby.

THE COURT inclined to this opinion, but made their motion fruitless (*a*), by declaring, that one of the things they designed to plead did, upon the record, appear to be false.

(*a*) But see the case of Ward *v.* The Charitable Corporation, that the Court will not, on a motion to plead double, take into consideration whether it be a good plea or not, Cases T. H. 126.; but if it be bad, they will give leave, on terms, to withdraw it, Jefferies *v.* Walter, 1. Wilf. 177. Nichols *v.* Sutcliffe, Cases T. H. 56.

Case 169. Rench *against* Britton.

A declaration in debt on bond, conditioned, "that if the defendant appear to answer *A. B.* of a plea of trespass, and also a bill," is good, although the writ be, "and also of a bill *of the said A. B.*"

DEBT UPON BOND. The condition, upon oyer, was, "That "if the defendant did appear, &c. to answer the aforesaid "*John Rench* of a plea of trespass, *ac etiam billæ*." The defendant pleaded the statute 23. *Hen.* 6. c. 9. about sheriff's bonds: and the plaintiff demurred.

IT WAS INSISTED *for the defendant in demurrer*, that the condition of the bond varied from the writ. THE WRIT was, "to answer the aforesaid *John Rench* of a plea of trespass, &c. *ac etiam* "*billæ ipsius Johannis*;" which words "*ipsius Johannis*" are omitted in the condition of the bond; and that this statute, being made to prevent oppression, was to be taken strictly; and several cases were cited (*a*) to prove, that the least variation or addition to the condition of the bond not warranted by the statute makes the whole bond void. But the case chiefly relied upon, as a case in point, was *Moore v. Finch* (*b*), where the action was debt upon bond, conditioned "to appear before *his Majesty* at *Westminster*, "to answer *A.* of a plea of trespass, and also of a bill to be exhi- "bited against him for a hundred pounds;" the defendant pleaded the statute of 23. *Hen* 6. and shewed, that the writ was to appear *coram dom. rege* at *Westminster*, *&c.* and the plaintiff demurred;

[328] and upon argument, the opinion of the Court was against the plaintiff, because the condition of the obligation was to appear before *his Majesty*; whereas it ought to have been *coram dom. rege*: and because it was not said in the condition, whose bill he is to answer; for it should have been "*ipsius A.*"

BRANTHWAYT, *Serjeant*, insisted, that it must be intended the bill *of the plaintiff*; and quoted cases to shew, that bonds varying in some minute circumstances from the statute have been supplied by intendment. In the case of *Kirkbridge v. Curwan* (*c*), the condition of the bond to appear "before the King's Justices at "*Westminster*;" it was objected, that this was not the title of the court; yet held good. In the case of *Wells v. Denton* (*d*) it is said, that the statute does not prescribe any form for the condition of the bond. In the case of *Villers v Hastings* (*e*), condition of the bond to answer the plaintiff *de placito debiti* only; and the writ was to answer in a sum certain; and yet held well.

(*a*) Year-Book 37 *Hen.* 6. fo. 1. 10. Co. 100. Plowd. 68. Hob. 13.
(*b*) 2. Lev. 177.
(*c*) T. Jones, 46. 2. Lev. 183.
(*d*)
(*e*) Cro. Jac. 286.

PARKER,

Bail.

PARKER, *Chief Justice*. The statute only requires, that the sheriff should take a bond conditioned for the appearance of the party such a day "at *Westminster*;" it is not said even "to "answer the plaintiff." The appearance mentioned is a personal appearance. The *ac etiam billæ* goes only to the matter of bail, whether common or special is to be required, and came in use after the statute. If the whole writ might be omitted, as certainly it may since the statute does not require it, then any part of it may be so likewise; nor does this bond vary from the form prescribed by the statute. If the party appear, he is bound to answer any bill that shall be filed against him. The bill in the condition of the bond cannot be intended of any other than the bill of the plaintiff.

The rest of THE COURT being of the same opinion, judgment *nisi* was given for the plaintiff.

* Stone *against* Taverner.

Case 170.

In an action of debt on bond, stating, that *A.* having lent *B.* 1000l. *B.* had given him a mortgage-deed, conditioned, that if *B.* should pay the interest until the principal was paid, that then the bond should be void, it is not necessary to assign a breach; for the indenture need not be set forth.

ACTION OF DEBT UPON BOND. Upon *oyer*, the condition of the bond appeared to be, "WHEREAS *Stone* having lent "*Taverner* the sum of one thousand pounds, for the better securing "of which *Taverner* has executed to *Stone* an indenture purport- "ing to be a deed of mortgage, &c. THE CONDITION of this "obligation is such, that if *Taverner* shall from time to time well "and truly pay the interest that shall become due, according to "the *proviso* in the indenture, until the principal be paid, then, "&c." The defendant pleaded, that he had paid *tantum quantum* became due; to which plea the plaintiff demurred.

SQUIB *for the plaintiff*. The defendant's plea is ill; because he has not shewn what was due, nor what he paid; so that no issue could be taken upon it (*a*). In the case of *Halsey v. Carpenter* (*b*), the bond was conditioned to pay *J. S.* and *J. N.* so much money *tam cito* as they came of age; and judgment was given upon demurrer for the plaintiff, because the defendant did not say when they came of age.

PARKER, *Chief Justice*. I am in doubt in this case whether, though the defendant's plea be admitted bad, you can recover without assigning a breach of the condition of this bond, as this case is circumstanced.

EYRE, *Justice*. The plea of the defendant is undoubtedly naught; because this being a bond for the performance of covenants in the indenture, the indenture ought to have been set forth by the defendant; whereas all that we know of the indenture is by way of recital in the bond.

PARKER, *Chief Justice*. The indenture need not be set forth. This is not a bond for the performance of the indenture; for that is in the nature of a deed of mortgage for a year, and is a security for

(*a*) Year-Book 20. *Hen.* 6. pl. 31. (*b*) Cro. Jac. 359.

the

Brown against Taverner.

the repayment of * the principal sum with a year's interest; whereas the bond is a security, not for the principal, but interest; nor for a year's interest only, but for the interest of a thousand pounds until it be paid, which now appears to be nine years more than the deed. As for those words in the condition of the bond, "according to the *proviso* in the indenture," they must necessarily and can relate only to the proportion of the interest.

A plea of payment to executors must shew that the testator is dead.

Mr. Squib, seeing the Court thus fluctuating in their opinions, took another objection to the plea of the defendant. The condition of the bond was, "to pay to *John Stone*, his executors, "administrators, and assigns;" and in his plea the defendant says, that "he paid to *Robert Stone* the interest that from time to time, "&c.;" and does not shew, that *John Stone* is dead, or that *Robert* is his executor.

Judgment was given for the plaintiff.

Case 171.

Child *against* Pierce.

Quære, Whether a declaration by assignees of a bankrupt, for so much money had and received by the defendant *from the bankrupt*, without averring it to be *the money of the bankrupt*, is good.

THIS was an action upon the case upon several promises, brought by the plaintiffs as assignees of a commission of a statute of bankruptcy against *J. S.*; and judgment passed by default; and writ of inquiry executed.

On a writ of error brought to reverse this judgment,

It was insisted, that the declaration of the plaintiffs was naught; for they declare, that the defendant was indebted to them, as assignees of a commission of bankruptcy against *J. S.* in the sum of three hundred and twenty pounds, for so much money had and received by the defendant from the bankrupt; and it is not said, that the money was the money of the bankrupt. It was acknowledged, that in pleas of bar, which may be supported by common intendment, this way of * pleading might possibly be admitted, and the money be intended the money of the bankrupt; but not in a declaration, where the words shall ever be taken in the strongest sense against him that pleads them. Formerly, in actions of debt, the whole agreement was used to be set forth; but now of late, a more concise way of pleading has in actions upon the case obtained. And yet even now to declare in an *indebitatus assumpsit* for goods sold and delivered would be naught upon demurrer.

* [331]

1. Sid 171.
1. Lev. 173.
1. Show. 112.
1. Wilf. 307.
304
1. Stra. 697.
Cowp. 570.
Vezey, 326.

It was argued *on the other side*, that this declaration was good; for that first of all this declaration sets forth, that the defendant was indebted, and then goes on and shews how, *viz.* by money received by the defendant, *i. e.* by a necessary intendment, such money as will create a debt, the money of the bankrupt. In the case of *Hicks v. Cockum* (*a*), judgment in the common pleas by default; and upon error brought it was insisted,

(*a*) Trinity Term, 12. *Anne*. Fort. 278.

that

that the declaration being for goods and merchandizes to the defendant *per eundem* the plaintiff before that time sold and delivered, &c. and not said the goods of the plaintiff, was naught; but the Court was of opinion, that the word "*indebitatus*" necessarily imported that they were the goods of the plaintiff. In the case of *Athorpe v. Jones* (*a*) there was judgment by default in the common pleas, and a writ of error brought; and the declaration set forth, that the defendant was indebted to the plaintiff in so much money for the use of a coach-horse of the plaintiff's, delivered by the said plaintiff to the defendant; and it was objected, that this delivery did not necessarily import a debt; for, possibly, the defendant might be to pay nothing for the use of him; but the Court were of opinion, that such a delivery must be intended as did create a debt. Chris against Pierce.

Adjournatur.

(*a*) Trinity Term, 1. *Geo.* 1.

TRINITY TERM,

The Second of George the First,

IN

The King's Bench.

Thomas *Lord* Parker, *Chief Justic*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Pratt, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
John Fortescue Aland, *Esq. Solicitor General.*

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*[332]

* Clarke *against* Elwick. Case 172.

A witness to a bond of arbitration may, under 9. & 10. *Will.* 3. c. 15. be compelled, by rule of court, to make an affidavit of its execution.

S. C. 1. Stra. 1.

MOVED for a rule against a man to shew cause, why he should not make an affidavit of his name being subscribed to an arbitration-bond; several affidavits being produced, that he had several times owned his being a witness, but refused to make affidavit.

IT WAS URGED, *in behalf of the motion*, that though it be generally true, that no man can be compelled to make an affidavit; yet it must not hold true in the present case, because then the statute 9. & 10. *Will.* 3. c. 15. will be entirely eluded, *viz.* "That all persons that agree to end their differences by an arbi-" "tration may agree to have this their submission made a rule of" "any of the courts of record, and may insert this their agreement" "in the submission, or condition of the bond, or promise; and" "upon producing *an affidavit* of such inserting, and upon reading" "and filing such affidavit, the same may be entered of record in" "such court; and a rule of court thereupon, &c."

* THE COURT first made a rule upon him to shew cause, why he should not make the affidavit desired, and the next Term, *viz.* *Trinity*, they made the rule absolute, being unanimously of opinion, that they had a power, by rule of court, to compel such persons as *[333]

CLARKE *against* ELWICK.

are witnesses to an award to make affidavits of their being so. And whereas it was objected, that there were no compulsory words in the act of parliament, it was said, that this was not necessary; that the very nature of the thing gave the Court a jurisdiction; that the person, by subscribing his name as a witness, had undertaken to give evidence at a proper time, and in a proper manner; and that here, the act of parliament having made it necessary for the evidence to be given by affidavit, the refusing to do it was an injury to the party concerned, in a matter belonging to the jurisdiction of this court (*a*).

On breach of an award made a rule of Court, the party may proceed both by *action* and *attachment* at the same time.

Salk. 73. 2. Term Rep. 643. 1. Burr. 278.

AND AS TO THE OBJECTION, that the party had here made and determined his election, which the law gave him, either to proceed by action upon the arbitration-bond, or to make the award a rule of Court, it was answered, that the party might at pleasure resort to this new remedy given by the statute; and that though he should even have got judgment upon the bond; for, perhaps, an attachment upon this rule of Court is a more quick and effectual process than suing out an execution upon a judgment. On a writ issuing out of another court, and returnable here, the Court may compel the proper officer to make a return. *Similiter* the Court may compel the making an affidavit in the present case.

(*a*) A rule was accordingly made on the witness to make an affidavit of the execution of the bond, S. C. Stra. 1. And the like rule was made by the court of common pleas in Easter Term, 16. *Geo.* 2. Barnes Notes, 8vo edit. 58.

* [334]

Case 173. * The Parish of Elsing *against* The County of Hereford.

The county-gaol, as to settlements, is considered as situate in every parish in the county.

S. C. 1. Sess. Cas. 99. S. C. 2. Bott, 5. pl. 13.

PARKER, *Chief Justice*, the rest assenting, said, that THE GAOL of the county was, with respect to settlements, to be considered as situate in every parish in the county; that therefore the removing of a person to gaol did not make any alteration of the settlement; and that consequently a bastard-child born in the county-gaol was to be esteemed as gaining a settlement by birth in that parish where the parent was settled when sent to gaol.

Case 174. Harvey of Comb's Case.

Commitment for high treason generally, good.

FIRST, A commitment for treason generally, without expressing the species of treason, is good; for the process is the same in one sort of treason as in another.

1. Stra. 3. 3. Viner, 334. 2. Wils. 158. 2. Hawk, ch. 16. s. 17.

High treason bailable by the king's bench.

Salk. 103, 104. But see 8. Mod. 93, &c.

SECONDLY, The court of king's bench has power to bail in high treason, notwithstanding the suspension of the *Habeas Corpus* Act; and in *Lord Montgomery's Case* (*a*), upon an affidavit made that the prisoner was in such an ill state of health that longer confinement would bring his life in danger, it was done.

(*a*)

Carrington

Carrington *against* Warren. Case 175.

THE COURT was moved, that an executor, being likewise heir at law, might have leave to plead double, viz. *solvit ad diem*, and *riens per descent*, to an action of debt upon a bond.

An heir shall not have leave to plead *riens per descent* with another plea, except he make affidavit that he has *riens per descent*

• THE COURT refused the motion, without an affidavit, that he had *riens per descent*. The same law in the case of an * administrator, who shall not be allowed to plead *plene administravit*, and *no assets*, without affidavit. For this is a matter incumbent upon the plaintiff to prove, and yet it lies more in the knowledge of the defendant than the plaintiff. It is the duty of the Court not to assist the defendant, by giving leave to plead double, but upon probable ground that the demand of the plaintiff, *quoad* the defendant, cannot be maintained.

Bunb 181, 182. Fort 336 Cases 1 H. 243. 5 Com Dig. 390.

The King *against* Dixon and his Wife. Case 176.

THIS was an indictment against *Dixon* and his wife, charging, that they, *et uterque eorum*, did unjustly and unlawfully, such a day *et diversis aliis diebus et vicibus tam antea quam postea*, keep a common gaming house, *contra pacem et formam statuti*, &c. To which indictment the defendant demurred.

An indictment will lie against a man and his wife jointly for keeping a gaming house.

THE FIRST OBJECTION taken against the indictment was, that it should not have been brought against the husband and wife, but against the husband only.

4 Bl. Com 64 167 Salk 382 384. 2 Ld Ray 197 2 Burr 1232. 2 Hawk. P. C. 135.

THE COURT. This objection would have weight in it if the property or the ownership of the house was the matter in question, but it signifies nothing here, where not the property, but the criminal management of the house (in which the wife may probably have as great, nay a greater share than the husband), is the fact charged. This case is not to be distinguished from the case of *The Queen v. Williams* (*a*), which was an indictment against husband and wife for keeping a bawdy house, and held good, for as there the wife may be concerned in acts of bawdry, so here she may be active in promoting gaming, and furnishing the guests with all conveniencies for that purpose.

* [336]

* THE SECOND OBJECTION was, that it was charged in the indictment that they, *et uterque eorum*, kept a gaming-house, &c. which was wrong; for two persons cannot jointly and severally keep a house; the keeping of the house by the husband and wife is not a keeping the house by the husband only, or by the wife only. For this purpose was quoted 2. *Rolles*, 51. an indictment against four persons for using the trade of a plumber, against the form of the statute 5. *Eliz.* c. 4. s. 31., and the indictment, which charged

An indictment against husband and wife, *et uterque eorum*, for keeping a gaming-house, is good.

(*a*) Ante, 63 Salk 384.

The King against Dixon and his Wife.

that they four *et uterque eorum* used the trade, was held naught, because the user of the one could not be the user of the other.

Salk. 382.

The Court. The case in *Rolles* is not applicable to the present case; for there the using of the trade not being the offence, but the using of the trade without having served an apprenticeship (an act to be performed by each singly and severally), it was an offence that was in its own nature impossible to be committed jointly; whereas here this may be committed by both jointly, and the addition of *uterque eorum* is but a further specifying and corroborating the former charge; for whoever says that *both* of them did keep, &c. does in truth and consequence say, that *each* of them did so.

Keeping a gaming-house is a nusance at common law.

The third objection was, that this indictment was upon a particular statute, *viz.* the statute 33. *Hen.* 8. c. 9. s. 18. and as it chalked out a particular method of proceeding for the recovery of forty shillings a-day, the party could not proceed by indictment.

The Court. The keeping of a gaming-house is an offence indictable at common law as *a nusance*; nor will the conclusion of the indictment, *contra formam statuti*, bar the party from supporting the indictment by common law, supposing it could not be maintained upon the statute; for where a statute creates or makes a thing an offence that was not so before by the common law, gives a certain penalty, and prescribes a method for the recovery of it, there the act must be pursued; but it is otherwise of an offence at common law, for which an act gives a new penalty, or a new remedy; for there the remedy at common law shall not be

* [337]

taken away without negative words (a) [illegible] it is clear, that an indictment is not taken away by any words in the statute; so far from it, that there are words which, unless they have relation to proceeding by indictment, must have no sense or signification at all; for it enacts, that the forfeiture may be sued for "by action, "information, bill, *or otherwise*." And as all the remedies, or different ways of proceeding, besides by indictment, are enumerated before, those words "*or otherwise*" must be understood of indictments, or nothing.

Salk. 460.

An indictment at common law for keeping a common gaming-house is good, though "ad commune "nocumentum" be omitted.

The fourth objection was, that if this were to be considered as an indictment for a nusance at common law, it would not be good for want of concluding, "*ad commune nocumentum* of the "king's subjects."

The Court. It is not necessary to conclude so here; the offence in its own nature importing that it is so. Besides, the word "common" supplies this defect, if it were one.

On an indictment, for that such a day A. kept a gaming-house, only one penalty can be recovered.

The fifth objection was, that as this indictment was laid, the penalty of forty shillings a day, given by this statute,

(a) See 4. Hawk. P. C. 5. *notis*.

could

could not be recovered; for it is not ſaid, that "*per ſpatium* of "one day, or ſeveral days, they kept, &c." but only that "ſuch "a day, &c." THE KING *againſt* DIXON AND HIS WIFE.

THE COURT. Keeping a common gaming-houſe any part of the day is enough. Indeed more days might have been * laid; but the time is ſo uncertain as to all but one day, that only forty ſhillings are recoverable. * [338]

The judgment was given for THE KING, unleſs, &c.

MICHAELMAS TERM,

The Third of George the First,

IN

The King's Bench.

Thomas *Lord* Parker, *Chief Justice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Pratt, *Knt.*
} *Justices.*

Sir Edward Northey, *Knt. Attorney General.*

John Fortescue Aland, *Esq. Solicitor General.*

MEMORANDUM. POWYS, *Justice,* was absent all this Term, being indisposed with the gout.

Fazakerley, Chamberlain of London, *against* Wiltshire. Case 177.

THE only question was upon the validity of a bye-law in the city of *London* (*a*), that none but *free porters* should intermeddle with the carrying or unloading of corn, salt, or sea-coal, or any other goods, out of any barge, lighter, &c. between *Staines Bridge* and *Kendal* in the county of *Kent*, that are to be imported into the port of *London*, under the penalty of forfeiting twenty shillings for each offence, except in time of danger, and to save the losing of goods.

The bye-law of the city of *London*, that none but *free porters* shall work in unshipping of corn imported into *London* from any place between *Staines Bridge* and *Kendal* in *Kent*, is good.—S. C. 1. Stra. 462. 1. Salk. 143. 192. 2. Roll. Abr. 579. Hob. 85. 4. Co. 32. 6. Co. 60. 1. Vent. 71. 1. Mod. 47. 79. 3. Mod. 158. 5. Mod. 104. 1. Bar. K. B. 76.

(*a*) This bye-law was made in the eighteenth year of *James the First*, *viz.* "THAT the corn porters should be a "Company, with twenty-four assistants, "who were called free porters, who "should work at a particular settled rate; "and that none but the free porters "should intermeddle in importing or "exporting any corn, roots, &c. within "the bounds mentioned in the custom, "on pain of twenty shillings for every "offence (except in time of danger or "urgent necessity, or in the case of *bona* "*peritura*), the forfeiture to be recovered "by action in the name of the chamber-"lain:" and four hundred porters are appointed. S. C. Stra. 462.

FAZAKERLEY, CHAMBERLAIN OF LONDON, *against* WILTSHIRE.

PEERE WILLIAMS, *against the bye-law*, argued to the following effect: * The bye-law restraining the number of carts in the streets of *London* did not prevail without the greatest difficulty (*a*); and the main reason why that bye-law was adjudged good was, that an unlimited number of carts would occasion stops, and be a nusance to passengers (*b*). A navigable river is, in all respects, like a highway; to be free to all, and none ought to be debarred from using it (*c*). A man cannot certainly have a more natural right to anything than to the free use of his bodily labour; and therefore a bye-law that shall restrain a man from the use of that, as this does, must be naught; especially when no recompence is given in lieu of it (*d*). To the performance of this employment, the serving an apprenticeship is not necessary; for it requires not skill, but strength. This is a bye-law that enhances the price of carriage, and encourages idleness. The extent of this bye-law is from *Staines Bridge* to *Kendal*, in the county of *Kent*; which is much too great. The king by his proclamation could not make such a bye-law; and certainly no derivative power can be greater than the primitive. There is not so much as an exception in this bye-law for the owner of the goods, or his own servants; so that, according to this law, a man can neither carry his own goods, nor employ his own servant, &c. This bye-law is penned in obscure and ambiguous words; it is very uncertain what act may amount to an intermeddling; perhaps the helping and assisting a free porter, though at his own request, may be construed such. From all these reasons put together he concluded, that this bye-law was both unreasonable and prejudicial to the subject; and therefore void. The cases quoted by him in his argument were, *Lutwyche's Rep.* 564. *Moor*, 591. 1. *Rolle's Abr.* 204. 2. *Brownlow*, 177. *Carter*, 68. 118. *Jones*, 144. 3. *Mod.* 158.

Adjournatur (*e*).

(*a*) See Bosworth *v.* Hearn, 2. Stra. 1085

(*b*) See Cuddon *v.* Eastwick, 6. Mod. 123.

(*c*) 27. Assize, 23. and see 2. Hawk. P. C. 7th edit. 152.

(*d*) 1. Roll. Abr. 559. 11. Co. 86.

(*e*) This case was argued again in Trinity Term, 7. *Geo* 1. and the Court was of opinion, that both the custom and the bye-law are good, inasmuch as it was a regulation convenient to the public, and the restraint only from bodily labour in one instance. S. C. 1. Stra. 468.—See also Robinson *v.* Webb, 1. Bar. K. B. 76. Bosworth *v.* Hearne, 2. Stra. 1085.

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Case 178.

* Banneaux *against* Plastead.

If a declaration be delivered generally as of the preceding Term, and it appear that the cause of action did not arise till after the first day of that Term, the record may, on motion, be explained by a special memorandum.

A DECLARATION was delivered generally as of the last Term; and in that declaration it appeared, that the cause of action did not arise before the middle of that Term.

Upon a verdict for the plaintiff, IT WAS MOVED *in arrest of judgment*, that the declaration being as of the last Term generally must have relation to the first day of the Term; and consequently

quently the declaration will, in point of law, be antecedent to the cause of action.

IT WAS URGED *for the plaintiff*, that by the entering of a special memorandum upon the record, *viz.* such a day of the Term, which would not contradict but explain the record, this motion would fall to the ground; and that this might be done without moving the Court.

PARKER, *Chief Justice*, and PRATT, *Justice*, were of opinion, that they might enter this memorandum of course, and without leave; and the rather, because here was no deceit as to the defendant; for he very well knew, that he was not arrested, nor bail put in, until the middle of the Term; and consequently that this declaration could not be as of the first day of the Term.

EYRE, *Justice*, was of opinion, that the special memorandum ought to be entered; but that the proper way was by motion.

CHESSHYRE, *Serjeant*, to end the dispute, moved for leave; and had it (*a*).

(*a*) See 1. Sid. 432. 1. Black. Rep. 2. Stra. 1151. 1271. 1. Wilf. 104. 171. 312. 3. Burr. 1241. 1. Stra. 582. Cowp. 456. Tidd's Practice, 191.

* The Queen *against* Simpson.

Case 179.

THIS was a case that had long been depending; and the only question reserved to be spoken to was, Whether, upon the statute of 3. & 4. *Will. & Mary*, c. 10. about deer-stealing, the justices of peace might convict the offender in his absence, upon his default to appear, being duly summoned? or, Whether the justices ought not, by issuing out their warrant for apprehending the party, to have compelled him to appear?

If a defendant to an information on a penal statute be duly summoned, and neglect to appear, the justice may proceed to examine the case, and on proof of the offence may convict the offender.

REEVES *for the latter side of the question*. The statute being silent in this matter, the rules of common law ought to be pursued as far as possibly they can. The judgment of the justices in this case is final; and there being no re-examination, natural justice requires that the justices should have the party brought before them, if possible. The statute 33. *Hen.* 8. c. 20. was the first statute that gave leave for a man to be tried in his absence; but this statute was held to be by consequence and implication repealed by the statute 1. & 2. *Philip and Mary*, c. 10. whereby all trials are left to the course of the common law (*a*). The consequence of a conviction upon this statute is very penal, *viz.* for want of sufficient distress a year's imprisonment and pillory. The subject-matter of this statute is a trespass at common law, in which case *a capias* lies; therefore the justices here ought to have issued out their warrant, which is their *capias*. There are no words in this statute

S. C. ante, 248. S. C. post. 37 S. C. 1. Sess. Cas. 346. S. C. Gilb. 282. S. C. Stra. 46. 2. Ld. Raym. 1546. 140[illegible] Stra 6[illegible]0. Salk. 181. Ante, 213. 2. Burr. 679.

(*a*) See Sir Wm. Staunford's Pleas of the Crown, 90. b.

that

The Queen *againſt* Simpson.

that give juſtices a power to convict without appearance; if they have it by * implication, it is a greater power than is veſted in the Judges of *Weſtminſter-Hall.* By this act of parliament a corporal puniſhment is to be inflicted; and according to the rules of common law, where the judgment is to be corporal puniſhment, judgment cannot be given in the abſence of the offender. Even in attainders by parliament, execution cannot be awarded without the perſon be preſent, and aſked, whether he has anything to ſay why judgment ſhould not, &c. But the very ſtatute we are now upon plainly ſuppoſes the party ſhould be preſent; for in the fourth ſection power is given, for fear the offender after conviction ſhould eſcape, to the conſtable, other officer, or perſon proſecuting, to detain; which plainly imports his being preſent. It is obſervable, that though by the ſtatute the power of convicting is given to the juſtices of the county where the offence is committed; yet in caſe the party fly, and is apprehended in another county, then this power is devolved to the juſtices of that county where the party is taken, purely that the party may be preſent when convicted. As to the objection, that this conſtruction will render convictions difficult, becauſe a perſon may be ſummoned when he cannot be taken, the anſwer is, that if a ſummons in this caſe were ſufficient, it muſt certainly be a perſonal ſummons; and he that can be perſonally ſummoned may be taken.

Fortescue, *Solicitor General, contra.* By the ſtatute which we are now upon, a new judge and a new way of proceeding is eſtabliſhed. The very deſign of the ſtatute is to prevent thoſe delays that attend the forms of common law proceſs. The pro-
[343] ceedings in this caſe, where the ſtatute is ſilent and does not interpoſe, are to be conducted by the rules of natural juſtice. * He denied the rule laid down, that in ſummary proceedings the rules of the common law are to be obſerved; eſpecially ſuch rules as would directly overturn the nature of a ſummary proceſs, and make it more prolix, &c. If this act of parliament had not intended to have pared away all the forms of common law, ſome of the proceedings by the common law would have been taken notice of by the act. It is very expreſsly ſet forth in the conviction that the party was duly ſummoned, and had notice to appear and ſhew cauſe why he ſhould not be convicted. This is all that the rules of natural juſtice require; he might have appeared if he pleaſed; and ſurely he ſhall not take advantage of his own wrong, or elſe it will be in the power of any perſon at pleaſure to avoid being convicted. As there are no words in the act of parliament that give a juſtice of peace power to convict in the abſence of the offender, ſo neither are there any words in the act that make his appearance neceſſary. If therefore the act of parliament is ſilent, and may be expounded either way, that expoſition ought certainly to prevail which will render the act moſt effectual. This is not to be conſidered as a criminal proceeding, but a civil one for a certain ſum of money.

By

By *Bagge's Case* (*a*), a person may be disfranchised, lose his freehold, if when duly summoned he will not appear; and the constant practice is to proceed to disfranchisement, in the absence, &c. if the party, being duly summoned, refuse to appear. Nay, this point was carried one step higher in *Glide's Case* (*b*); for it is there held, that if the party live out of the town he need not be summoned; and the reason is, because it was his duty to attend.

THE QUEEN *against* SIMPSON.

N. B. There were two convictions; and in one of them the party, before conviction, was heard by his * attorney: therefore it was observed by THE SOLICITOR GENERAL, that though, strictly speaking, according to the forms of law, the offender could not make an attorney to appear for him, yet in this case, where the process is of a summary nature, and the rules of natural justice principally to be regarded, it is material, that any person was heard in his behalf; because then it cannot be said, that the person was condemned unheard. There is no case or authority quoted to shew, that the justice has a power to apprehend. It is true, that where an act of parliament is plain, consequences are not to be regarded (*c*); for that would be to assume a legislative authority. But where an act of parliament is doubtful, there the consequences are to be considered; and care is to be taken, that such an interpretation be not put upon the act as will quite elude the force of it; and that will be the case here, if there can be no conviction but upon the appearance of the party. Whereas no inconvenience, no breach of any rules of natural justice, attends the other interpretation of the statute 5. & 6. *Will. & Mary*, c. 22. about hackney-coaches, which is almost a parallel case; and the general practice of the commissioners there is, to convict without appearance upon a summons. * [344]

PARKER, *Chief Justice.* A court may, perhaps, in prudence not care to give judgment in the absence of the party; but I see no reason but that it may be done, and I take it to have been done in *Mawgridge's Case* (*d*). Execution cannot indeed be awarded but in the presence of the party; but that depends upon this reason, that there may possibly be a mistake of the person; or some other reason may have happened, subsequent to the judgment, why execution should not be awarded, which it is but reasonable the party should have an opportunity to insist upon. * But here had the party appeared, it is taken for granted that judgment might have been given in his absence. I am of opinion, that the summons must be personal; and therefore it is altogether as easy to take as to summon. The act plainly supposes, that the justices have a power to apprehend him; or else the clause would be a nugatory clause which supposes the offender may be apprehended. The expression of detaining does likewise suppose him present; otherwise the act should have run thus, "in case he be present." It is a known and general rule, that a statute ought to be interpreted by the rules of * [345]

(*a*) 11. Co. 93.
(*b*) Trinity Term, 4. *Will. & Mary.*
(*c*) Hob. 97.
(*d*) 1. Kely. 119. 9. St. Tr. 61.

common

THE QUEEN *against* SIMPSON.

common law: and therefore since this is in nature of a trespass, for which *a capias* by common law lies; since the act plainly supposes justices of peace have a power to apprehend him, and that they will execute this power; and since it is as easy to apprehend as it is to summon, I am of opinion at present, that the justices ought to have the party before them.

PRATT, *Justice*. If a justice of peace has a power of issuing out his warrant for the bringing of the party before him, it must be given him either by the express words of the statute, or as a power incident to the jurisdiction which the statute invests him with; if the latter way, I fear he must have the same power allowed him in all summary proceedings. If a summons be sufficient, I know not why the same summons should not do here as in other cases, *viz.* the leaving it, where the party cannot be found, at the usual place of his abode; and then a person may be summoned when he cannot be taken.

Adjournatur (*a*).

(*a*) This case was argued again in the Hilary Term following, and the conviction adjudged to be good. S. C. post, 378.

* [346]

Case 180.

* The Case of the Corporation of Banbury.

Previous to 11. *Geo.* 1. c. 4. the election of a mayor must have been on the charter-day.

1. Mod. Cases in Law and Equity, 129.

PARKER, *Chief Justice*. If a mayor be not chosen by the time prescribed by the charter, and there be no provision in the charter for the old mayor's continuing on until a new mayor is chosen in, the corporation is dissolved, and consequently cannot proceed to a new election (*a*). Indeed, some are of opinion, that this may be cured by the issuing out of a writ under THE GREAT SEAL, impowering them to proceed to a new election; but others are of opinion, that even this will not do, and that there is no other remedy but to obtain a new charter from THE CROWN. But nobody ever thought, that in such a case the *quondam* corporation could revive itself by choosing a new head, without such a writ under THE GREAT SEAL (*b*).

(*a*) But see now 11. *Geo.* 1. c. 4.

(*b*) See an account of this case from a manuscript note of it by Lord Hardwicke, Rex *v.* Pasmore, 3. Term Rep. 221. where it is decided, that when an integral part of a corporation is gone, and the corporation has no power of restoring it, or of doing any corporate act, the corporation is so far dissolved, that the crown may grant a new charter, 3. Term Rep. 199. 249.

Case 181.

Johnson *against* Louth.

A *gunner* in the artillery, if arrested, shall be discharged on common bail.

S. C. 1. Stra. 7.

THE QUESTION was, Whether *a gunner* was within the late act of parliament, that orders those listed as soldiers to be discharged from arrests for debt.

IT WAS OBJECTED, that they were not within the act, because they were warrant officers, and took a particular oath, and because the

the makers of this act of parliament seemed apprehensive that they would not have been liable to the same punishment, in case of mutiny and desertion as other soldiers, unless they had, by an express clause, made them so. It was likewise insisted, that the design of the act being to encourage men to enter into the king's service, must not be extended to such in the army whose pay was so considerable as that this alone would be a sufficient inducement. The pay here was one shilling and fourpence a-day. JOHNSON against LOUTH.

* THE COURT. As to the clause in the act relating to mutiny and desertion, the act only supposes it possible that there might be a doubt; and therefore wisely resolves to make every thing clear, where the punishment to be inflicted is nothing less than death. But then the act of parliament resolves the doubt, as we do now, that he is *a soldier*. The matter does not turn upon the *quantum* of the pay; if it did, *a trooper* most certainly would be out of the act (*a*), whose pay is much more considerable than that of *the gunner*, and who generally gives a good sum of money for his place. The reasons why a gunner's pay is more considerable than that of the soldier are in respect of their skill, and the hazard they run; both which considerations render their service more necessary, and make it more reasonable that they should not be taken away from the service. * [347]

Accordingly he was discharged.

(*a*) It was adjudged in the case of Bayley *v.* Jennets, that a trooper is within the act. 1. Stra. 2.

HILARY

HILARY TERM,

The Third of George the First,

IN

The King's Bench.

Thomas *Lord* Parker, *Chief Justice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* . } *Justices.*
Sir John Pratt, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir William Thompson, *Knt. Recorder of London, Solicitor General.*

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* [348]

* Cole *against* Hawkins. Case 182.

ASSUMPSIT. The plaintiff declared upon a promise made the sixteenth of *January* 1706.

In transitory actions, time and place not material.

S. C. ante, 251.

S. C. Gilb. 279.

S. C. 1. Stra. 21.

The defendant pleaded in bar the statute of Limitations; and that the cause of action did not accrue within six years before the exhibiting of the bill.

The plaintiff replied, the bill was exhibited the twenty-third of *January* 1713; and that cause of action did arise within six years before exhibiting the bill.

To this the defendant demurred.

PARKER, *Chief Justice*, now delivered the resolution of THE COURT.

Judgment must be given for the plaintiff. For this being the case of a parol promise, the day in the declaration is not material; and therefore the plaintiff in his replication has only departed from an immaterial part of his declaration, which would be cured by a verdict, and is now aided, upon a general demurrer by statute for amendment of the law. * Were it more than matter of form, * [349]

a verdict

Cole *against* Hawkins.

a verdict finding the promise at another day could never cure it, as most certainly it would. And for this purpose was quoted the case of *Lee v. Rayne* (*a*), where this learning is laid down, that for the plaintiff in his replication to vary from the time or place in his declaration, in order to follow the defendant's plea, is not a departure. In the old Books, indeed, this would have been a departure (*b*). And unless what strictly speaking is a departure be sometimes allowed; unless the plaintiff, where the defendant by his justification makes the time or place material, may follow the defendant's plea, though it lead him to another time or place; all that doctrine, that in transitory actions, where time and place are not material, the plaintiff may declare at any time or place, must fall to the ground.

Judgment for the plaintiff (*c*).

(*a*) Lev. 110. reported likewise 1. Keble, 566. 578.

(*b*) 22. Ass. 86.

(*c*) See Stafford v. Forcer, ante, 311. Mathews v. Spicer, Stra. 806.

Case 183. Burgh *against* Blunt.

Motion for an attachment for disobeying a tolt.

CHESSHYRE, *Serjeant*, moved for an attachment against the judge of the court of *Holdernesse*, in *Yorkshire*, for disobeying *a tolt*, whereby the cause was to have been removed into the county-court, from whence, as THE SERJEANT believed, the parties designed by a *pone* to remove it into the court of common pleas; and though, by a *recordare*, it might have been removed at once into the court of common pleas, yet the parties might take this way, if they pleased.

CHESSHYRE, *Serjeant*, in behalf of his motion, urged, that disobedience to the *tolt* was a contempt to the law of the land, over which the court of king's bench were guardians; that that court was invested with a general * jurisdiction over inferior courts, and was to take care, not only that they did not transgress their jurisdiction, but likewise that they proceeded regularly in matters confessedly within their jurisdiction.

* [350]

Ante, 48. 60.

EYRE, *Justice*. The more proper way is first by *mandamus* to oblige them to obey the *tolt*; and if, notwithstanding that, they proceed, an attachment may be granted for disobedience to the *mandamus*. I do not see, why we may not as well grant an attachment against the judge of a spiritual court, for proceeding after an appeal, as do what is now asked.

PARKER, *Chief Justice*. There are several other remedies besides that desired. You may have a prohibition; or you need make no defence, and bring your writ of *false judgment*; and when they shall return that they were served with the *tolt*, as they must, it will then appear, that all the proceedings are erroneous; for their jurisdiction failed upon the receipt of the *tolt*.

But

But CHESHYRE, *Serjeant*, pressing his motion, and PAGE, *Serjeant*, affirming that he had the motion granted to him in the case of *King v. Langston*, BURCK *against* BLUNT.

THE COURT made a rule to shew cause, why *an attachment* should not be granted.

The King *against* Theed. Case 184.

THE COURT was moved to supersede a writ *de excommunicato capiendo*.

A writ of *excom.* in a suit "*in quodam negotio pro reformatione et correctione morum*" is too general.

The objection to the writ was, that it was too general; and that it did not appear, that the causes for which the party was to be imprisoned by the writ *de excommunicato capiendo* were of spiritual conusance; * for it was only *in quodam negotio* concerning the correction and reformation of manners:

* [351]

S. C. 1. Stra. 43.

To this it was said, that the same strictness is not required in writs as in libels; and further it was much insisted upon, that he was said to be excommunicated, according to the canon; and the cases of *The King v. Toseland (a)*, and *The King v. Fowler (b)*, were quoted.

But THE COURT were clearly of opinion, that the writ was too general (c).

The writ of *excommunicato capiendo*, though opened by the court of king's bench, and delivered to the sheriff to execute, may, if it appear to have been issued erroneously, or without just cause, be superseded before it is returned.

Salk. 294.

THEN IT WAS INSISTED UPON, that the motion for the *supersedeas* was made too early, because it was made before the sheriff had returned the writ; and to this purpose 1. *Siderfin*, 181. was cited.

PARKER, *Chief Justice*. This is a writ which issues out of chancery, returnable into this court, and is delivered to the sheriff in the presence of the justices; and this whole matter is entered upon record. Now when the court of chancery has issued out this writ, and it is delivered to the sheriff, the chancery, if applied to for a *supersedeas*, would probably say, they had nothing to do with it. And then, if the court of king's bench cannot grant a *supersedeas* before the return, the consequence will be, that a subject may for a long interval of time, *viz.* between the delivery of the writ to the sheriff and his return, be wrongfully deprived of his liberty, without possibility of redress. The command to the sheriff to execute the writ is the command of the king; and the question is, whether this Court shall let the sheriff execute that writ, when the execution of it is intrusted to them, and an entry of record made of it, where the writ appears to the Court to have issued out erroneously. * Certainly this Court might have quashed it before it was delivered to the sheriff; *à fortiori* therefore now; for it is no more than for us to correct our own mistakes, by calling back a writ that issued through our oversight.

* [352]

(a) [illegible]
(b) Salk. 293.
(c) See also Rex v. Clapp, Easter Term, 1. Geo. 1. and Reg. v. Hill, 1. Salk. 293.

The King against Thred.

Eyre, *Justice*. The return of the *habeas corpus* has no relation to the writ *de excommunicato capiendo*, which entirely destroys the authority of the case in *Siderfin*. I take this court to be possessed of the cause by the entry of the writ upon record, and delivery over to the sheriff. The writs that go out of this court, if they issue erroneously, are frequently superseded before the return; though those are writs as much out of the hand of the court as this writ.

Pratt, *Justice*. I take the reason of the provision, that this writ issuing out of chancery, and returnable into this court, must first be opened in this court, and in the presence of the justices of this court be delivered to the sheriff *exequend.* to be a provision in favour of the liberty of the subject, that a subject may not be deprived of his liberty by writs that issue of course out of chancery, until such time as the Judges of this court see whether he has deserved it or not. To say this writ cannot be superseded before the return, is as much as to say, that this Court shall not correct their own mistake until the mistake has occasioned as much mischief as possibly it can.

Parker, *Chief Justice*. This writ is actually entered upon record; for the entry is *delib. fuit* in the presence of the justices, to the sheriff *exequend.* The writs that issue out of this court are never entered at large upon record before the return, though in strictness they ought; but here the writ is always entered at large.
353] * The superseding of our own writs before the return is a sufficient proof that writs may be superseded, though not in court. The obligation of the sheriff to execute this writ results from an act of this Court; and ought therefore to be subject to the controul of this Court. It is a general rule, that whenever the Court is possessed of a record, they will proceed upon it. And upon this ground it is, that if the plaintiff in an appeal become nonsuit, the Court will nevertheless oblige the party to plead to it. In fact, these writs have not been superseded before their return; but I see no reason why they may not.

A *supersedeas* was granted accordingly.

Case 185. The College of Physicians *against* Dr. West.

A graduate of one of the universities cannot practise physic in *London*, without a licence from the College of Physicians.

8. Co. 117.
2. Bulst. 185.
Palm. 486.
4. Mod. 47.
2. Brownl. 261.

The question was, Whether a man who had taken his degree of *doctor of physic* in either of the universities might not practise in *London*, and within seven miles of the same, without a licence from the College of Physicians?

The Court was clearly of opinion, that a licence from the College was necessary; and that by reason of the charter of incorporation, confirmed by the statute 14. & 15. *Hen.* 8. c. 5. penned in very strong and negative words.

As to the testimonials granted by the universities, upon a person's taking the doctor's degree,

The

THE COURT was of opinion, that these testimonials might have the nature of a recommendation; they might give a man a fair reputation, but conferred no right; and consequently all those statutes which have confirmed the privileges of the universities could revive or confirm * nothing but the reputation that this testimonial might give such graduates. And whereas it has been insisted, that by the last clause of this statute it is said, "That none "shall practise in the country without a licence from the president "and three elects, unless he be a graduate of one of the universi- "ties;" it was said, all the inference from that would be, that possibly two licences may be necessary where a person is not a graduate. In the case of *Dr. Levet* (a), *Lord Chief Justice* HOLT did not think this a question worth being found specially. The College of Physicians, is, without doubt, more competent to judge of the qualifications of a physician than the universities; and there may be many good reasons for taking a particular care of those who practise physic in *London*. The College of Physicians against Dr. W... * [354]

Adjournatur (b).

(a) 1. Ld. Raym. 472.

(b) It is said by Lord Raymond to have been adjudged in this case, that a graduate-doctor of the University cannot practise physic within *London*, or seven miles round, without licence from the College of Physicians, 1. Ld. Ray. 472.

The Queen *against* Aires. Case 186.

PARKER, *Chief Justice*, gave the resolution of the Court. —We are all of opinion, that judgment must be given for the king. The king may bring a *scire facias* to repeal letters patent. S. C. ante, 258.

THE FIRST OBJECTION is, that a *scire facias* is not the proper remedy, the king not being concerned; but that an action upon the case should have been brought. As to this, *Sir Oliver Butler's Case* (a) is an express authority, that a *scire facias* is the proper way; and that the crown *de jure* ought to permit subjects to sue in the name of the king. * [355]

THE SECOND OBJECTION, that there should have been an office found, may be answered by the same authority; for the objection was there taken, and it was held, * that no office is necessary, because there is no forfeiture. The king may repeal letters patent without office found.

As to THE THIRD OBJECTION, arising from the days upon which, &c. the answer to that is, that it is matter of evidence, of which the jury are the proper judges. *Bracton* (b) shews how the law anciently stood with respect to different days and distances within which fairs and markets could or could not be held. Markets in *London* are very close upon one another; and the public good requires that it should be so, which will over-balance a private detriment. The days and distances upon and at which fairs and markets are held, are matters of evidence for the jury.

(a) 3. Lev. 220.

(b) Bract. lib. 4. c. 46.

A scire facias to repeal a patent, stating that the patent was prejudicial to another's right, is sufficient.

A FOURTH OBJECTION was, that it is said, that *the grant was* to the prejudice; whereas it should have been, that *the markets* were to the prejudice. And in favour of this objection the 11. *Hen.* 4. *pl.* 5. was quoted. In the case quoted the grant was conditional, *viz.* so far as it should not be prejudicial; and therefore I doubt not, but in that case, if there had been a prejudice, an action upon the case would have lain, notwithstanding the grant; but the case before us is the case of an absolute grant, which is to be set aside because it breaks in upon another's right. The finding in the *ad quod damnum* is thus, "it would be no damage if we "grant." What would be no damage? The grant.

A scire facias does not abate by the demise of the crown.

As to THE FIFTH OBJECTION, that the *scire facias* was discontinued by the death of the queen; we are all of opinion, that this is helped by the statute 1. *Anne*, c. 8. penned in the strongest terms imaginable.

S. C. 1. Stra. 43.

JUDGMENT was given against the defendant.

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Case 187. * Thornby *against* Fleetwood.

A common recovery suffered by a papist tenant in tail, for the purpose of making a marriage-settlement is good; for he is not "a purchaser" within the statute 1. *Jac.* 1. c. 4. s. 6.

S. C. ante, 113.
S. C. post. 406.
S. C. Comyn Rep. 207.
S. C. 1. Stra. 318.
S. C. Bro. P. C. 203.
Harg. Co. Lit. 132, note.
1. Peere Wms.

JUDGMENT having been given for the defendant in the court of common pleas, a writ of error was brought in the court of king's bench.

MR. REEVES *for the plaintiff in error.* This case depends upon the construction of three acts of parliament; all of them acts made *pro bono publico*, to prevent the growth of popery; and therefore they all ought to have a large and liberal interpretation; such an interpretation as will best answer the design of their making.

THE FIRST QUESTION in this case is, Whether the statute 1. *Jac.* 1. c. 4. is not repealed by 3. *Jac.* 1. c. 5. or 3. *Car.* 1. c. 2.? That it is not repealed by 3. *Jac.* 1. c. 5. is plain enough; because the persons, offences, and penalties, in these two acts of parliament, are different. Nor is it repealed by 3. *Car.* 1. c. 2. It is not pretended to be repealed directly, and by so many express words; on the contrary, it is said in the beginning of 3. *Car.* 1. c. 2. that the statute 1. *Jac.* 1. c. 4. shall be in full force. Such an interpretation, if possible, ought to be put upon these two acts, as that they may both continue in force; especially when the latter act takes notice of the former, as an act in force, and which ought to continue so. If the statute 1. *Jac.* 1. c. 4. was repealed by 3. *Car.* 1. c. 2. then the offenders against 1. *Jac.* 1. c. 4. would be in a better condition after the statute 3. *Car.* 1. c. 2. than before, which no one can imagine who reads the preamble of statute 3. *Car.* 1. c. 2. But this would plainly be the case; their capacity

[357] to * purchase would be restored, &c.; the statute 3. *Car.* 1. c. 2. as to persons already beyond the seas, would be entirely ineffectual; for it is contrary to law, that persons out of the land should be outlawed, unless in some particular cases especially provided for.

Lord

Trotter v. Flaxton.

Lord Coke (a) is positively of opinion, that the statute 1. *Jac.* 1. c. 4. is in force, notwithstanding the statute 3. *Jac.* 1. c. 5. and 3. *Car.* 1. c. 2.

The second question in the case is, Whether any estate will vest in the offender, notwithstanding the statute 1. *Jac.* 1. c. 4. the words whereof, as to this purpose, are: "shall in respect of "himself only, and not in respect of his heirs or posterity, be dis- "abled to inherit, purchase, take, have or enjoy, any profits, he- "reditaments, chattels, debts, legacies, &c. And that all estates, "terms, and interests whatever to be made, suffered, or done, to "the use of any such person, or upon any trust or confidence, "mediately or immediately, to or for the benefit or relief of any "such person, shall be entirely void." It is hard to imagine, that all manner of conveyances whatever should be made void; and yet the capacity of having the lands vest in him, not taken away. As for those words, "not in respect of his heirs or posterity," the meaning of that is only to enable the heir to inherit from any remote ancestor, notwithstanding this incapacity or disability of the more immediate ancestor. The interpretation contended for on the other side, is directly contrary to the words of the act. For whereas the act says, "that in respect of himself, he shall not in- "herit, &c." they say he shall, and by that means be enabled by fine, &c. to bar the heir; which, if he be protestant, will most certainly be done. This then is an interpretation flatly against the words of the act, in favour of the offender, and to the prejudice of the heir, who is by the act of parliament designed to have all the power over the estate. * *Hobart* (b) mentions two sorts of rights, viz. *jus acquirendi* and *jus alienandi*, so that, according to him, the right of alienating is looked upon as a right or interest. As to the objection, that if this be a right or interest, it is such a one from which no advantage can possibly accrue to the party, because upon sale the money is forfeited, it may be answered, that money may be disposed of secretly, may be sent beyond sea, and the forfeiture impossible to be come at. Besides, the power of disposing of the estate is a very considerable privilege, though he were not to get any money by it. To the objection framed from those words, "and not in respect, &c." besides what has been said before, they prevent corruption of blood, and make the punishment personal only. To the objection, that by interpretation of law, the crown is to have the profits during non-conformity, it may be answered, that the rule laid down by them must be admitted for law; *viz.* that in penal statutes, when the act is silent to whom the penalty is forfeited, the crown shall have it. And so it must have been here, had the words of the act been, "shall forfeit;" and not said to whom. But this is not the case; for here the act creates an incapacity in the offender to *take*; and if he cannot take, most certainly he cannot *forfeit* (c). If the king is to have the profits only, and not the estate, then the king has directly the same interest as he

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(a) 3. Inst. 178. (b) Hob. 336. (c) Co. Lit. 13. a.

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has upon outlawry in personal actions; which is a very precarious interest; for according to 21. *Hen.* 7. *pl.* 7. *a.* this pernancy of the profits may be determined by the alienation of the person outlawed. It must be owned, that this case is not altogether law; for it
[359] is resolved (*a*), * that after inquisition found, the person outlawed cannot alien; and so is the case of *Britton v. Cole* (*b*). But still at any time before inquisition found, the interest of the king may be defeated by the alienation of the person outlawed.

The act being silent as to the person who shall take, it must be interpreted according to the rules of common law. And here it may be proper to consider the nature of disabilities at common law, which are of three sorts: First, *Propter delictum*, as in case of attainder for treason or felony. Secondly, *Propter defectum subjectionis*, as in the case of an alien. Thirdly, *Causâ professionis*, as in the case of a monk.

In the first case, *viz.* attainder for treason, the estate is forfeited to the king, and the blood is corrupted. A capacity is indeed left in the party to purchase for the advantage of the crown; but a person thus attainted can purchase nothing for his own benefit; neither can he take by descent. The law is the same in an attainder of felony; save that the lands are forfeited to the lords of whom they are held. Now the disability in this act of parliament, differs from the former in these respects: First, It is temporary during the non conformity. Secondly, It is a personal disability only; for it does not corrupt the blood. Thirdly, The party is intirely disabled and incapacitated to purchase.

The second sort of disability at common law, is that *propter defectum subjectionis*, as an alien. And such a one has no inheritable blood in him; he cannot be heir to anybody; nor can anybody be
[360] heir to him. Indeed it is resolved, in the case of *Collingwood* * *v. Pace*, reported at large 1. *Ventris*, that this shall not hinder any collateral relation from inheriting. An alien may purchase for the advantage of the crown. This disability comes nearer to the disability created by this act; but yet differs from it: For first, the issue is not disabled by the statute; and secondly, the party is made entirely incapable of purchasing.

The third sort of disability by common law, is that of a monk; and this disability seems in every respect to agree with the disability created by this act. A monk cannot purchase; no more can the offender against this statute. The heir of a monk is not disabled from claiming by him; so it is here. The monk when deraigned is to be restored; so is the offender here when he conforms. When the law says that a monk is *civiliter mortuus*, this is to be esteemed only a similitudinary expression, and what is used concerning other persons, as one that had abjured the realm; for a monk, with respect

(*a*) Ray. 17. Hardres, 101. (*b*) 9. *Will.* 3. Salk. 395.

to all the advantages of the church, is as much alive as any other person whatsoever (*a*). THORNBY against FLEETWOOD.

That interpretation therefore ought to prevail, where the act is silent, as will best square with the rules of law, in like cases. Thus in 3. *Co.* 85. *b.* we find the statute *De Donis* expounded, in several instances, by the rules of common law. This statute will be made effectual, if interpreted by the rules of law in case of a monkish disability. And this likewise will answer the grand objection, What becomes of the estate during the life of *Philip?* A man has issue two sons, the eldest brother goes beyond sea, the father dies, the second son, in a writ of *Mortdauncestor*, recovers the estate (*b*), for it seems the being beyond sea, was then looked upon as an incapacity; and yet there held, that upon the return of the elder brother, the * land should be divested out of the younger brother, and revest in the elder. *Philip* incurred the disability of being an alien before the descent; and because the law will not cast a descent upon a person disabled by attainder or otherwise, therefore the dutchess does not put up her claim under any of the disabled persons, but as a reversioner (*c*). * [361]

But to return to the grand objection, *viz.* If the estate in fee should go to him in remainder, or escheat, what is to be done in case *Philip* have issue, or conform himself? To this it may be answered, FIRST, That there are not in the act any words of restitution with respect to the offender himself. Indeed after conformity he is to be discharged from his incapacity; but nothing appears in the act, whereby he is to be restored to what he has lost during his non-conformity. In this respect, it may be compared to the effects of denization, with respect to descents and from aliens (*d*). But if it should happen by accident, that some of the posterity should be hurt; yet is not this a sufficient objection? It is a received maxim of law, that a freehold can never be in suspence or abeyance, save in cases of absolute necessity (*e*). If then the freehold must be in somebody, where must this freehold be but in the reversioner? In *Plowden (f)* there is an instance of the dodging of a freehold; and though this case is in part denied to be law, in 3. *Co.* 10. *b.* yet there it appears, the freehold must vest in the king to prevent abeyance. But the issue of *Philip* may be let in according to the rules of law. In the Year-Book 49. *Edw.* 3. 16. there is this case: If a tenant of the king devise that his executors shall sell his land, and die without heir; the land shall vest in the * king; and if the executor afterward sell the land, it shall revest. To this purpose is the case before cited, where, upon the return of the elder brother, the land shall revest in him. Another case is there put: A disseisor dies without heir, the land escheats, yet the disseisee may bring his action for the land against the lord; which is a stronger case * [362]

(*a*) Co. Lit. 132.
(*b*) Fitz. Abr. "Mortdauncestor" 47. 55.
(*c*) 1. Vent. 417.
(*d*) 1. Vent 419.
(*e*) Co Lit. 342.
(*f*) Plowd. 48.

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than that before us; for it is not just that the issue in tail should suffer for the act of the tenant in tail. *Lord Coke (a)* delivers it as his clear opinion, that if a man make a feoffment in fee, to the use of himself and his wife in tail, then to the use of the husband in fee, and has issue a daughter and dies, leaving his wife privily with child of a son, by which means the reversion in fee descends to the daughter, and the wife, before the birth of the son, levies a fine, or suffers a common recovery, whether in this case, the daughter enters, or does not enter, whether she joined in the fine, was vouched in the common recovery, or did any other act to disable herself, yet that the son born afterwards shall have the estate-tail; for it is not reasonable that any act of the daughter shall prejudice the son *in utero matris.* Though before a late act of parliament, it was customary to vest an estate in trustees, for the preservation of contingent remainders; because by a principle of law, a remainder must vest, either during, or at least when the particular estate determines; yet it has never been thought necessary in case of a remainder actually vested, even before the late statute, to vest the estate in trustees, for the preservation of the inheritance to after-born children. The dutchess might in a *formedon* deduce her pedigree from the donor, taking no notice of the donees, according to 8. *Co.* 88.

[363] * CHESHYRE, *Serjeant*, argued *for the defendant*, that the estate must necessarily vest in the offender, to answer the *proviso* in case of conformity; for if the estate do not vest, the encouragement to conformity will be taken away; there being no possibility according to the rules of law, for the heir to take, but through the ancestor. He doubted whether the answer to this objection would hold, *viz.* that the issue should for his benefit be allowed to say, that the ancestor did take, when every-body else must say, that he did not take. He observed, that the saving to the posterity, was inserted in the very body of the act, and did not come in by way of *proviso*; which shews it to have been first in the thoughts of the law-makers; that it was enough for the defendant, if the estate must vest in the ancestor for the benefit of the issue; and likewise, that the title of the defendant did not necessarily depend upon the validity of the common recovery; because *Philip* was alive, and either had issue, or (which was all one in intendment of law) was capable of having issue.

Then he proceeded to shew, that that interpretation of the act, whereby the estate was adjudged to vest in the offender, was FIRST, more safe; SECONDLY, more consonant to the rules of law; and THIRDLY, would more effectually promote the design of the act.

FIRST, More safe; because if the ancestor do not take, the act is altogether silent who shall. Besides, as the legislators did not intend to restrain the offender absolutely from purchasing; for,

(a) 3. Co. 61. b.

in his opinion, he might purchase for his heirs to enjoy after him, but not to retain; so by a parity of reason, the law-makers did not intend to restrain him from taking by descent, for * the benefit of his issue, but only from taking to retain for his own benefit. He urged, that their interpretation created a difference never thought of by the law-makers, as to the time when the descent happens, *viz.* if it happen before the conformity of the offender, then with respect to that estate, his conformity (according to them) shall not at all avail him; but if it happen after conformity, then he shall take. The act of parliament would most certainly have provided for the reversioner, if they designed it should go over to him. As to what was said concerning the regard the law paid to the certainty of a freehold, and that it should not be in abeyance, save in cases of absolute necessity, he allowed that to be law, but thought it made entirely for him; because unless the estate did vest in the ancestor, there could be no tenant to the *præcipe*. He observed, that this came to be a question after the death of the offender, who, during his life, had always been esteemed to have a good title, and forty years after the offence committed; that a writ of *dower* had been brought against the ancestor, and judgment against him in that action; and this judgment confirmed in parliament, which could not have been, unless he had been a good tenant to the *præcipe*. That unless this interpretation prevailed, and the estate allowed to vest in the offender, many marriage settlements and purchases would be overturned, and multitudes of lessees, all claiming under this offender, must unavoidably be ruined. Upon these accounts, he concluded his construction of the statute to be the most safe.

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* [364]

SECONDLY, He argued, that this construction was most consonant to the rules of common law, where no particular direction is given how the estate shall go, for there the law always throws it upon the king. * And where can this power be lodged safer than in the crown? Who so zealous and able to put the law in execution? *Tutissima est custodia quæ sibi creditur.* Thus in outlawries, attainders for treason or felony, the offender may take for the benefit of the crown.

* [365]

THIRDLY, This interpretation will more effectually promote the end and design of the law. This is not, as is pretended by the other side, a lowering of the penalty. The profits of the land is both in law and reason the land itself (*a*). And he who is excluded from taking the profits, is excluded from the land, as to all purposes of profit and advantage for himself. According to the interpretation they would put upon the act, it may so happen, that a *Roman* Catholick, only through the misfortune of a foreign education, may be excluded, to make way for a rigid papist bred at home.

(*a*) Co. Lit. 4.

Then

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Then he argued, that this offence being pardoned by the statute 2. *Will. & Mary*, c. 10. *A. D.* 1690, the disability was so *ex consequenti*; and that this pardon coming out before the time of the descent, was equivalent to a conformity (*a*). But it may be objected, that this is a fact not found in the special verdict. To which he answered, that this act being a general law, the Court must *ex officio* take notice of it. And had the offender not been included in the act, it would have been incumbent upon the other side to shew that he was excepted out of the pardon (*b*).

Then he argued from a clause in the 2. *Will. & Mary*, wherein it is expresly provided, that that act of parliament should be taken notice of in evidence, without pleading, that by a parity of reason, the Court ought to take notice of it, though not found by verdict.

*[366] * Then by a nice and minute observation of the difference between the two acts of 1. *Jac.* 1. c. 4. and 3. *Car.* 1. c. 2. he shewed, that though the former was not repealed by the latter, yet it was strengthened, enlarged, and explained by it.

Then he insisted, that as the estate-tail subsisted unspent, it could not go over to him in reversion. *Philip*, in judgment and consideration of law, may have issue as long as he lives. Nay, he further insisted, that he might have issue at the time of the descent: Nay, that it must be supposed, that he has issue now alive; that had the case been otherwise, the contrary should have appeared in the special verdict. Notwithstanding the endeavours of the Counsel of the other side, he said it still remained a doubt, in case the estate is to go over to the reversioner, by what rules of law the estate can be brought back again, for the sake of the offender (in case of conformity), or for the issue. The case of *Fitzherbert* (*c*) is a hard case, and not law now. As to the case put of a disseisor dying without heir, that case proves no more, than that as long as the tortious estate did subsist, so long (and longer in the nature of the thing were impossible) the lord had a right. But no case has yet been cited, where the entry of him in remainder or reversion had been held lawful, the estate tail subsisting and remaining unspent. The vesting and revesting of estates, is a thing not at all favoured in law. He acknowledged, that in 1. *Co. Rep.* 87. it is held, that a grant of a rent *de novo*, to cease during the minority of the heir of the grantee, was good, and would cease accordingly. *[367] * But to this he answered, First, That this does not hold in the case of a grant of rent *in esse*. Secondly, That the estate in the rent itself did not cease; but the estate was only exonerated in point of render, and not of vesting. In 23. *Edw.* 3. 19. (the same case with that just mentioned in *Co. Rep.*) it appears, that the wife of the grantee did recover the rent in a writ of dower, with a cesset

Ante, 360.
Ante, 361.

(*a*) 3. Lev. 331, 332.
(*b*) 2. Lev. 26. 28.
(*c*) Fitz. Abr. "Mortdauncestor" 47.

executing

executio, during the minority of the heir; and that judgment was affirmed in parliament, which could not have been if it had ceased intirely. If a tenant in tail be attainted of treason, it works no corruption of blood (*a*), because that would have produced a cesser of the estate-tail, by which means the estate would have been taken from the king, and gone to him in the reversion, which the act did not intend. This reason will hold here, for the heir cannot take by descent, where the ancestor did not take; for the ancestor is the root from whence the inheritance must be derived. That the donee "died without issue of his body," are necessary words in all *formedons*; which is a plain proof, that a *formedon* will not lie, but upon the death of the donee without issue. If a monk had issue at the time of his profession, he in the remainder cannot bring a *formedon*. If the dutchess had brought her *formedon*, the life of *Philip* had been an unanswerable objection.

THOMPSON *against* FLEETWOOD.

Adjournatur (*b*).

(*a*) Hob. 346. (*b*) See S. C. Note (*a*) ante, 125.

Cook *against* The Duchess of Hamilton.

Case 188.

In what case a variance between a writ of error and the record returned is immaterial.

THIS was A WRIT OF ERROR upon a judgment in the court of common pleas; and the Court being about to give their opinion for the affirmance of the judgment,

THE COUNSEL *for the plaintiff* * *in error* moved, that the record was not removed; there being a plain variance between the record described by the writ of error, and the record returned by the court of common pleas. * [368]

The case, as to this point, stood thus:

The writ of error run thus, "*quia in recordo et processu ac etiam* "*in redditione judicii loquelæ quæ fuit in cur. nostra coram vobis* "*et sociis vestris justic. nostris de banco per breve nostrum inter* "*J. S.*" and thirty-one defendants there named, *error intervenit*, *&c.* and by the record returned it appeared, that the original action was between *J. S.* and the thirty-one defendants before named, and one defendant more; and that the verdict was likewise had against the thirty-two defendants; but that the thirty-second defendant died before judgment, and that notice was taken by an entry upon the record of his death; and the judgment was given only against the thirty-one named in the writ of error.

FIRST, This was urged to be a variance between the writ in the record described by the writ of error, and the writ in the record returned.

SECONDLY, It was insisted, that the offence or trespass mentioned in the writ of error, which was a trespass by thirty-one defendants, must be a different trespass from that in the record returned, which was a trespass by thirty-two defendants.

PARKER,

COOK against THE DUCHESS OF HAMILTON.

PARKER, *Chief Justice*, delivered the resolution of the Court to the following effect: We are all of opinion, that this writ of error is well brought, and the record well removed, notwithstanding both these objections.

THE FIRST OBJECTION is capable of three answers: FIRST, That the word "*inter*" does not refer to "*breve*," but "*loquela*." It is true it may refer to either; so that the Court will, since the rules of language will admit of it, refer it to that, which will uphold the writ of error. If there be a *comma* put between "*per*
[369] "*breve nostrum*," * and the word "*inter*," then the word "*inter*" will plainly refer not to "*breve*" but "*loquelæ*." The word "*breve*" is only used to shew what way the suit was commenced, by writ or bill. If the writ of error had been "*sine brevi*," then it had been impossible, from the nature of the thing, that the word "*inter*" could refer to "*breve*."—SECONDLY, Supposing the Chief Justice of the court of common pleas may be made *by writ*, as well as the Chief Justice of the king's bench, then the words "*per breve*" may refer to the Chief Justice.—THIRDLY, When any one of the defendants dies, it is no longer a writ against him; and then the case is all the same, as if he had never been named in the writ. To this purpose was quoted the case of *Oliver v. Hunning (a)*, where it was resolved, that an original writ was determined by outlawry; *à fortiori* it will be so in the present case by death. To the second objection we answer, that the identity of the trespass does not depend upon the number of the persons that committed it; for the trespass may be the same, be it committed by five or ten persons. And to this purpose the case of *Hunt v. Rawson (b)* was relied upon, as being a case full in point. A court of justice ought to endeavour to expound things so, that they may be brought to some end.

The judgment given in the court of common pleas was affirmed.

(a) Trinity Term, 13. *Will.* 3. (b) Trinity Term, 10. *Will.* 3.

*[370]

Case 189. Woodright *against* Wright.

On a devise to *A.* in tail, remainder to *B.* and the issue of her body lawfully begotten; remainder to the right heirs of *A.* for ever. If *A.* die without issue, living the testator; and *B.* after making of the will, had issue *C.* heir at law to *A.* and dies, living the testator, the heir at law to the testator, and not *C.* shall have the land.—S. C. 2. Eq. Abr. 666. S. C. 1. Stra. 25. S. C. 1. Peer Wms. 397.

UPON a special verdict found by the jury, the case was shortly this:

The testator devised the land in question to *Edward Basil* in tail; remainder to *Susannah Wright*, and the issue of her body lawfully * begotten; remainder to the right heirs of *Edward Basil* for ever. *Edward Basil* died without issue, in the life-time of the testator. *Susannah Wright*, some years after the making of the will, had issue *Margaret Wright*, the defendant, who is found

likewise

likewise to be heir at law to *Edward Basil*; and then *Susannah Wright* died in the life-time of the testator. The plaintiff's title was as heir at law to the testator. WOODMANSEE against WRIGHT.

The question therefore was, Whether *Margaret Wright* could claim any estate under this will, either as heir at law to *Edward Basil*, or as daughter to *Susannah Wright*?

The arguments from the bar in this case I did not hear; but the resolution of the Court was by PARKER, *Chief Justice*, delivered to the following substance:

THE FIRST POINT to be considered is, Whether *Margaret Wright* is entitled to take by the will, as heir at law to *Edward Basil*, by virtue of these words, "the remainder to the right heirs "of *Edward Basil* for ever!" And here the question is singly this, Whether these words do make the heirs of *Edward Basil* devisees, and import any devise to them? so that the devise is not a lapsed legacy, by the death of *Edward Basil*, in the life time of the testator; or, whether *Edward Basil* is not sole devisee, and those words only used to denote and describe the nature and the quality of that estate, which was hereby designed to be solely given to *Edward Basil*, viz. to speak in the language and *idiom* of law, whether these words are words of *purchase* or *limitation*? The case of *Bret v. Rigaen (a)* must be most certainly, and was on all hands, allowed to be law. * The second point only in that case, is applicable to this; and that was shortly thus. The land was given to *Henry Bret* and his heirs; *Henry* died in the life-time of the testator, and the question was, Whether the son and heir of *Henry Bret* should take the land by this devise?— MANHOOD, who argued for the son and heir of *Henry*, urged most of those arguments that have been now made use of from the bar, in favour of the defendant; he insisted that the heir was included in the devise; and though perhaps the testator designed that he should take *mediante patre*, viz. by descent, yet this is but a circumstance relating to the manner of his taking: and therefore, since by the act of God, it is impossible that this circumstance can be complied with, and necessary that the heir, if he take at all, must take immediately, that is certainly the better and more preferable construction in case of a will, which supports the main end and design the testator chiefly aimed at, though it cannot the form and manner the testator designed that end should be brought about by; rather than that which overturns the substantial, as well as the circumstantial part of the testator's intention. And these cases were put: If land be devised to *A.* for life, remainder to *B.* in tail, and *A.* dies in the life-time of the devisor, *B.* shall take by the will an estate-tail in possession.—If land be devised to the wife of *J. S.* and *J. S.* dies, and she marries *J. D.* and then the devisor dies; she shall have the land. And yet the testator designed in the first case, that *B.* [371]

(a) Plowden.

should

Woodbright against Wright. should take an estate-tail in reversion; and in the second, that the wife of *J. S.* should have the land; but this being impossible, it was resolved, that *B.* should take an estate tail in possession; and that the wife of *J. D.* should have the land, in order to preserve the substance of the will when it was impossible to observe the formality; but for all this it was resolved, that the heir of *Henry Bret* could not take. For as in all grants there must be a grantor

*[372] and a grantee, at the time when the * grant is to take effect, so by parity of reason, in the case of a will, there must be in being a devisee at the time of the death of the testator; that being the time, when by law a will is to take effect. And as to what was said, that heirs were named in the devise; it was resolved, that those words "his "heirs," were inserted only to limit and set out what sort of estate the devisor intended *Henry* should take by the will, *viz.* a fee simple; and that consequently those words were put in as well to enable *Henry* to give away the land from his issue, as to let it descend to his issue. That the descent to the issue, was but a consequence in law, of a fee-simple first vested in *Henry*; and what lay entirely in the breast of *Henry*, whether he would permit it to be so, or not. That it was not a good way of reasoning, that because the land would have descended to the heir of *Henry* if it had vested in the father first, therefore the heir shall take immediately, though the father died in the life-time of the devisor; for then by a parity of reason, if *Henry* had died in the life-time of the devisor without heirs, the lord would have had the land by escheat, and the wife of *Henry* must be intitled to dower. This case then being undoubtedly law, and so allowed to be on all hands; the next thing to be done, is to see, whether the present case can be distinguished from it. The difference assigned is this, that the devise is not here as in *Plowden*, a devise to *Edward Basil* and his heirs; but a devise to *Edward Basil* in tail, remainder to *Susannah Wright* and the issue of her body lawfully begotten, remainder to the right heirs of *Edward Basil* for ever. So that between the devise to *Edward Basil* in tail, and the devise to the right heirs of *Edward Basil* for ever, there intervenes an intire estate, *viz.* that to

[373] *Susannah Wright*, &c. * But to this I answer, that this difference produces no other effect, than a diminishing or lessening of the estate in fee-simple in point of value, that is by these words of the will to be conveyed to *Edward Basil*, by carving an estate-tail out of it. So that the only difference on this account, between the case in *Plowden* and the present case, is this, that in *Plowden*, *Henry Bret* was to have taken a fee-simple in possession; here *Edward Basil* was to take a fee-simple in reversion. In *Co. Litt.* 319, it is held, that if an estate be limited to the ancestor for term of life, remainder to *B.* in tail, remainder to the right heirs of the ancestor, the words "right heirs" are words of *limitation*, and not of *purchase*; as well as if the estate had been limited immediately to the ancestor and his right heirs, without the intervening of the estate-tail in remainder. This is the very same case with that before us; except that the case of *Littleton* is the case of a grant,

a grant, and this before us is the caſe of a will, which as to this point makes no difference at all. If *Edward Baſil* had ſurvived, nobody can ſay, but that the fee would have veſted in him, and in him alone; he would then have had the entire power over the eſtate, and the deſcent to his heir would then have appeared plainly to have been but a conſequence of the fee veſted in him, and which at his pleaſure he might permit or prevent. It is not his living to take the freehold, that does as it were accidentally turn theſe words into words of limitation; but becauſe theſe are in their own nature, and in all events, words of limitation, therefore it becomes neceſſary that the anceſtor muſt take, or nobody. So that upon the whole theſe words, though they may, perhaps, carry ſomething in their ſound, that looks like a deſign and intention in the teſtator of favour towards the heirs, in reality are not ſo, but ſerve only * to deſcribe the eſtate which paſſes to the deviſee, and for his benefit only: and then it comes out to be the ſame point intirely with that reſolved in the caſe of *Bret v. Rigden*.

Woo[illegible] against Wa[illegible]

* [374]

It being clear then, that the defendant can take nothing by this deviſe, as heir at law to *Edward Baſil*; the next point to be conſidered is, Whether ſhe can take anything as daughter to *Suſannah Wright*, by virtue of that clauſe in the will, "remainder to "*Suſannah Wright* and the iſſue of her body lawfully begotten?"

In ſpeaking to this point, it will be neceſſary to ſee, Firſt, Whether ſhe can have any right, ſuppoſing the words "iſſue of her "body" be looked upon as a ſynonymous expreſſion to the "heirs "of her body?"

And ſecondly, Whether, ſuppoſing ſhe has no right this way, ſhe can derive any right, by any other interpretation which the word "iſſue" is capable of?

As to the firſt, the caſe differs not from that of *Bret v. Rigden*; ſaving that there a fee is deviſed, and here an eſtate-tail, which will make no difference in the interpretation before us; for if here the words "heirs of her body" are not words of purchaſe but limitation, the point comes out juſt the ſame. For ſuppoſing *Suſannah Wright* had lived, ſhe and ſhe only would have taken by this deviſe; and ſhe would have had a power of barring the iſſue by fine. (I ſpeak not now of common recoveries; becauſe though there the iſſue is barred, yet in conſideration of law, he is recompenſed by a judgment to recover over.) And here again, by the ſame reaſon that the daughter of *Suſannah* ſhould take, the huſband muſt be tenant by the courteſy, which they for the defendant will not ſay is law. In ſhort, the only difference that there is between a deviſe in fee, and in tail, is this, that in the former caſe the deviſee has a greater choice and variety of ways, whereby he may defeat the iſſue, than in the latter. But the words "to the heirs of the body" are as much words of limitation, and as * proper to expreſs an eſtate-tail, as the word "heirs" is to expreſs a fee. And the words in both, do not really import any deſign of favour to the heirs, but the deviſee

* [375]

FORRESTERT against WRIGHT.

visee only; and so much the rather in the case of an estate-tail; because it is a known and a common method, where the testator or grantor has a concern or regard for the issue, to make the ancestor tenant for life only, and by that means tie up the hands of the ancestor from doing anything to the prejudice of his issue. It cannot be denied to have been the principal design of the makers of the statute *De Donis*, to secure the estate to the issue, and restrain the ancestor from conveying the estate from the issue; and therefore admitting, but not granting, that this devise, in those times, when that statute reigned in full force, would have imported a devise as much to the issue as ancestor, since the one was as certain to take by the devise, in due time, as the other; yet would it not be so now, after that statute is so much altered by subsequent statutes, or judgments of courts of law, whereby the ancestor has it now in his power by fine, &c. I speak not of common recoveries, for the reason before given; for to shake the law, when firmly established, is not to be done, without the greatest danger to the estates and properties of the subject; and I must have thought myself obliged to have submitted to the number and weight of authorities, though I had not been satisfied with the reasons upon which they were established. The doctrine established in the case of *Bret v. Rigden*, remained uncontroverted until *Hartop's Case (a)*; when it received a new sanction. So likewise it was again established in the case of *Fuller v. Fuller*, reported *Moore*, 353. and 3. *Cro.* 422.; and though it is said, that two Judges differed in their opinions, yet upon a narrower inspection it appears, that those very Judges that dissented, have, by the reasons they gave [376] for their dissent, confirmed the * law now in question; for they were of opinion, that the devisees might take as purchasers, not by the first devise, but by virtue of the new publication, which, in their opinion, amounted to a new will.

And now I come to consider, SECONDLY, Whether the defendant can put any other construction upon the word "issue," by virtue of which she may claim under this devise. In the case of *King v. Melling (b)* the word "issue," is by *Lord Hale* affirmed to be *nomen collectivum*, and takes in the whole generation; and is therefore a great deal stronger than the word "children." It is there observed, that in all acts of parliament, the word "issue" is as comprehensive as "heirs of the body;" as in the statute *De Donis*, and the statute 34. *Hen.* 8. c. 20. of entails settled by the crown. *Tyler's Case (c)* may serve to shew the difference between the words "issue" and "children." *Tyler* had issue *A. B. C.* and *D.* and devised to his wife for life, after her death to *B.* his son in tail, and if he die without issue, then to his own children; *A.* had issue a son and died, and *B.* died without issue; and it was resolved, that the son of *A.* should not take as one of the children of the testator. Yet in *Wild's Case (d)* it is admitted, that if the devise

(a) 33. *Eliz.* Cro. Eliz. 344.
(b) 1. Vent. 229.
(c) 34. *Eliz.* in *B. R.*
(d) 6. Co. 17.

had

had been "to the children of the bodies," it would have been an eſtate-tail; *à fortiori*, if it had been, as in our caſe, "to the iſſue of "their bodies lawfully begotten;" becauſe "iſſue" is, *ex vi termini, nomen collectivum*, which "children" ſingly is not, though by other additional words it may become ſo. The caſe itſelf, in *Wild's Caſe*, was only this: that if a deviſe be made to a man, and after his death to his children, or his iſſue, and he has iſſue at the time of his death, the iſſue ſhall take by way of remainder. Upon the whole it appears, that theſe words are words of limitation, and do moſt certainly, in a * will, give an eſtate-tail; and then the point comes out juſt the ſame. If the deviſor had died juſt after the making of the will, it is plain, that *Suſannah* would have taken an eſtate-tail. If it be objected, that the eſtate-tail reſults from an operation of law; that the teſtator deſigned firſt an eſtate to the deviſee, then an eſtate to the heir; and that it is the law that conjoins them, and creates an eſtate-tail out of both; I anſwer, that the law creates an eſtate-tail, purely to uphold and preſerve the intention of the teſtator, which would be often deſtroyed and defeated, if the children of the deviſee that were in being, either at the time when the will was made, or at the time when the will takes place, *viz.* the death of the teſtator, were to be conſidered as ſo many diſtinct deviſees. For example, ſuppoſe an eſtate deviſed to *B.* and the iſſue of his body lawfully begotten, remainder to *C.* &c. if *B.* has iſſue at the time of the death of the teſtator, *J. N.* and after the death of the teſtator has iſſue *J. S.*; according to this notion, if *J. N.* die without iſſue, the eſtate will go to the remainder-man, and not to *J. S.* which was moſt certainly the intention of the teſtator. And other caſes might be put of the ſame nature; ſo that taking by limitation, and taking by purchaſe, is not a mere notion and way of thinking; but will in reality often let in other perſons to take than what the teſtator deſigned, and in effect amounts to the making a new will. The ſuppoſition of kindneſs in the teſtator for the iſſue, is too precarious and ſlender a foundation to build upon; and generally ſpeaking, the deviſee is the only perſon, out of kindneſs to whom the deviſe was made; eſpecially it ſeems to have been ſo here, where the iſſue was born ſeveral years after the making the will, and conſequently could not be thought upon by the deviſor. * The beginning of the will, whereby *Edward Baſil* is, by general words, conſtituted heir of all (though how he was ſo is explained by the ſubſequent clauſes of the will), pleads ſtrongly that the deviſe was not out of pure kindneſs to the iſſue. The danger of this conſtruction is none; for, upon ſuppoſition that the deviſor intends a favour to the iſſue, he has it ſtill in his power, during his life, to alter his will accordingly: ſo that the only conſequence of this conſtruction is, that it will oblige men, upon the death of their deviſees, to do what is certainly prudent and proper to do, *viz.* reconſider their wills.

Woodbridge against Wright.

* [377]

* [378]

Judgment was given for the plaintiff (*a*).

(*a*) See Hutton *v.* Simpſon, Prec. Chan. 439. 2. Vern. 722. Elliot *v.* Davenport, 1 Peer Wms. 84. Hodgſon *v.* Ambroſe, Dougl. 330. White *v.* White, 1. Bro. C. C. 219. note. Jones *v.* Morgan, 1. Bro C. C. 206. Doe *v.* Kett, 4. Term Rep. 601.

The

Case 190. **The Queen *against* Simpson.**

Justices of peace may convict an offender in his absence, upon his default to appear, after being duly summoned.
S. C. ante, 248. 341.
S. C. 1. Sess. Cases, 346.
S. C. Gilb. 282.

SEVERAL CONVICTIONS before justices of the peace, upon the statute of 3. & 4. *Wil. & Mary*, c. 10. for deer-stealing, being removed by *certiorari* into the king's bench, exceptions were taken to them, which were argued several times (*a*).

PARKER, *Chief Justice*, now delivered the resolution of the whole Court to the following effect: The great objection against these convictions is, that the justices of the peace have no authority to proceed against the party, and convict him of the offence in his absence. As to this matter we are all of opinion, that the conviction is a good conviction, though taken in the absence of the party. And here it is to be observed, that the statute does not give the justices any particular direction, or prescribe any particular form to be observed in the convictions before them; all that the statute requires is, that this conviction be "by oath of one credible witness." *[379] So that the justices are not obliged to the observance of any rules, unless those of natural justice, which all men are bound to observe. One of those rules I readily own is, that the offender should be heard before he be condemned. But this rule must admit of this limitation, *viz.* unless the party refuse to appear. For as it would be unjust not to require the justices to *summon* the party, and give him notice to appear and make his defence, so to require more from the justices, would be to put it in the power of the offender to elude justice, and render his conviction impossible, by wilfully absenting himself. As to the manner how this notice is to be given, the act being altogether silent, we must recur to natural justice, which only requires the party should know when and where he is to appear and make his defence; and if he will then neither appear himself, nor trust his defence to any-body else, it is highly reasonable he should be proceeded against; and not reap an advantage from a wilful and criminal absence. But it is objected, that statutes are best expounded by rules of common law; and that it is more agreeable to the forms observed by the common law, not to convict the party in his absence. I readily admit the rule laid down by them, that statutes are best expounded by rules of common law in like cases; and will therefore examine how the common law proceeds in criminal cases, where the party refuses to appear. And first, in case of outlawry for treason or felony, the law interprets his absence as a sufficient evidence of his guilt; and without requiring further proof or satisfaction, the law accounts him guilty of the fact; corruption of blood, and forfeiture of estate, ensues. In real actions, the second default is final and conclusive; and the Court, without regarding the merits of the cause, will give judgment that he shall lose his land. *[380] Outlawry in lesser crimes, or in personal actions, does not, as in the first case, in judgment of law, occasion the party to be looked

(*a*) See S. C. ante, 248. 341.

upon

upon as guilty of the fact; or, as in the second case, occasion a judgment for the thing in demand; but is yet in its consequences more penal and fatal than if it did. For a restraint of the liberty of the party, if he can be found, the profits of the land while the outlawry remains in force, and all his goods and chattels forfeited to the king, together with an exclusion from the benefit and protection of the law, follow upon it. But it will be said, that for all these proceedings, the law has prescribed and directed all the forms and circumstances necessary to be observed in them. I proceed therefore to proceedings of a more *summary nature*, and consequently more resembling the case before us. The office of common-council-man is in law accounted a freehold; and yet nobody will say but a man may be amoved from it in his absence. To come now to proceedings in our own courts. Is it not our daily practice to set aside judgments irregularly obtained, grant attachments, &c. in the absence of the parties? Notice indeed must be given; but if the party will not appear, the Court proceeds without seeing or hearing. It is observable, that in some of the cases put before, the law proceeds to condemn the party not only in his absence, but for his absence, or, which is all one, esteems his absence so strong an argument of guilt, that further proof is esteemed superfluous; whereas here the justices only proceed to examine, whether the charge be true; and do not condemn the offender, but on proof by oath. * The case before us is like to the award of a writ of inquiry upon default, by common law. In many summary proceedings, there is no power given to oblige the party to appear; and that is the case here; there is no express words in the act by which it is given. By implication it cannot be given, unless it were of absolute necessity to the doing of justice; which I have shewn it is not. If this doctrine were true, it would follow that a member of a corporation might be arrested, in order to compel him to appear. By this rule the party must appear, though he th[illegible] fit to confess the fact and pay the penalty. If courts of law, that are armed with a coercive power to bring the party in, do not, in the cases I have before mentioned, think themselves obliged, from the nature of the thing, to use this power; certainly we cannot expect it from justices of peace, who really are destitute of this power. Besides, I cannot see to what purpose this appearance before the justices is required. For when the party is before them, can they oblige him to make his defence? No, unless he pleases; and if he had pleased, he might have appeared without force; and yet the only end of his coming before them, is in order to make his defence. Lastly, the objection of not being forced to appear, cannot be made by the party; because if it be an error, it is one in favour of him who makes the objection; for this would be contrary to the general rule of law in other cases. But it is objected, that the summons is faulty; for it ought to appoint a particular hour of the day, place, &c. To this I answer, that as to this, the record stands thus: "*licèt summonitus, &c. ad hoc tempus, et hunc* "*locum,* * *defaltam fecit.*" Now this in strictness does necessarily import,

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* [382]

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import, that the summons was to appear upon that very spot as to place, and that very instant as to time, where and when the justices were assembled; otherwise it could not have been a default. And what the justices have returned, must, by us, be accounted true in every particular. But it is objected, that these sorts of records are, as is very well known, not made up by the justices, according to the truth of the fact; but drawn up by advice of counsel, so as to obviate all the objections that may be made against them. To this it must be answered, that we ought to give credit to the justices of peace, in the execution of that power the law has intrusted them with; and that if the justices should make a false return, whereby the party and justice are abused, they may be punished.

The convictions were adjudged good (*a*).

(*a*) See Rex *v.* Kent, 2. Ld. Ray. 1546. Rex *v.* Venables, Stra. 630. 2. Ld. Ray. 1405. Reg. *v.* Dyer, Salk. 181. Reg. *v.* Green, Ante, 213. Rex *v.* Mallinson, 2. Burr. 679.

Case 191. **The King *against* Hammond.**

An indictment for a nusance "*in communi* "*strata sive a* "*via regia*," good.

S. C. 1. Stra. 2. Roll. Abr. S. C. cited And. 143.

THIS CASE had formerly been argued (*a*); and now PARKER, *Chief Justice*, gave the resolution of the Court.

The objections taken to this indictment were two:

FIRST, That the place where the nusance was laid to be committed, was uncertainly alledged; for it is said to be "*in communi* "*strata sive alta regia via.*" To this the answer is, that the words "*communis strata*," and "*regia via*," are synonymous expressions, and signify the same thing. The proper signification of the word "*strata*" signifies a paved way; but now the word is used in a more general sense; and for this purpose several authorities, both ancient and modern, were quoted. A navigable river is esteemed a highway (*b*).

*[383] * THE SECOND OBJECTION is, that it was not set forth from what place to what place the highway led, in which the nusance was said to be committed. The answer to this is infinite (*c*), and has no *terminus a quo*, nor *terminus ad quem* (*d*).

The indictment was held good.

(*a*) The indictment charged, that on such a day, year, and place, the defendant ten loads of straw and dung *in communi strata sive alta regia via posuit et locavit et ibidem per decem dies remanere permisit*, so that the king's subjects could not pass. And on demurrer it was objected, that the nusance was laid to be in one place or another, and bring in the disjunctive the Court could not intend *communis strata* and *alta regia via* to be the same. S. C. 1. Stra. 44.

(*b*) Fitz. Abr. "Challenge," 279.

(*c*) Rex *v.* Thompson, 10. *Will.* 3.

(*d*) Latch 183. 3. Keb. 89.

Smith

Smith *against* Parks. Case 192.

A LEASE being, in ſtrictneſs, forfeited by non-payment of rent, the leſſor brings an ejectment.

If in ejectment, on a forfeiture of a leaſe for non-payment of rent, the proceedings be ſtayed on bringing in the arrears, the Court, on affidavit that the defendant is a ſoldier, will oblige him to give ſecurity for the rents.

The leſſee by bringing into court what was due for arrears of rent with coſts, &c. obtained a rule to ſtay proceedings upon the ejectment (*a*).

The leſſor moved the Court to diſcharge the rule, unleſs the defendant would give ſecurity for the payment of rent, upon an affidavit that the defendant was a ſoldier, and ſo by law intitled to a protection.

THE COURT. If you will have equity you muſt do equity; if by the equity of the Court the plaintiff loſe the benefit of the forfeiture of the leaſe the law gives him, it is but reaſonable, that he ſhould have ſecurity for the payment of rent; eſpecially when it appears upon oath, that the defendant is ſuch a perſon, as is by law privileged from payment of his debts.

1. Mod. Caſes in Law and Equity, 343.

(*a*) See Phillips *v.* Doelittle, 8. Mod. Rep. 746. Holdfaſt *v.* Morris, 2. Wilſ. 345. Goodtitle *v.* Holdfaſt, 2. Stra. 115. 900. Stephenſon *v.* Noright, 2. Black.

*[384]

Chaplain *againſt* Southgate. Case 193.

THIS was an ACTION OF COVENANT; and the caſe was this: The defendant leaſed to the plaintiff a farm called *Dale*; and there being a pretence of a right of common ſet up to two cloſes, comprehended in the * leaſe, the leſſor covenanted with the leſſee, that he ſhall quietly enjoy the ſaid two cloſes, againſt all claiming, or pretending to claim, any right in them.

On a covenant for quiet enjoyment, a breach aſſigned, that having, or pretending to have a claim time out of mind, he entered and diſturbed the leſſee, is good.

Upon this covenant the leſſee brought his action, and aſſigned his breach thus: that ſuch a one having, or pretending to have, a claim time out of mind, did enter upon the ſaid cloſes.

To this the defendant demurred.

Cro. Car. 5. Hob. 12. 1. Mod. 293. 3. Mod. 135. H. Bl. Rep. 275. 1. Term Rep. 671.

IT WAS INSISTED *by the defendant's Counſel*, that the covenant extended only to legal, not tortious claims; and therefore that the plaintiff ſhould have ſet forth, that the claim of him that diſturbed him was a legal one (*a*).

But THE COURT were of opinion, that the words of the covenant did extend to all interruptions whatſoever; and ſo was the plain intent and meaning of the parties; for if it was to extend to legal claims only, then would the tenant be put under the hardſhip of trying the right for the landlord; which was the very thing

(*a*) See Kirby *v.* Hanſaker, Cro. Jac. 315. Bickerſtaff's Caſe, Vaugh. 119. Teaſdale *v.* Eſſex, Cro. Eliz. 213. Perry *v.* Edwards, 1. Stra. 400.

 the

CHAPLAIN *against* SOUTHGATE.

the tenant plainly designed to prevent by this covenant. This case is very different from the case of *Kirby v. Hansacre*, for there it did not appear but the disturber might claim even under the lessee himself; but this is impossible here, by reason of those words, "time out of mind." The breach is well assigned.

Judgment was given for the plaintiff (*a*).

(*a*) See Lloyd *v.* Tompkins, 1. Term Rep. 671.

* [385]

Case 194.

Savill and his Wife *against* Kirby.

The spiritual court may proceed against a person for saying to or of a married woman, "*You are a bawd*," nor will a prohibition lie on a suggestion that they were spoken in *Westminster*, and that an action had been brought for them in *the Marshalsea*.

THE SPIRITUAL COURT had proceeded against the defendant, for these words spoken against the wife, "You are a bawd."

The defendant moved for *a prohibition*, suggesting that these words were spoken at *Westminster*, and that the city of *Westminster* is an ancient city, and that there is an ancient custom within the * said city, that whores should be punished by imprisonment: suggesting likewise, that an action had been brought for these words in THE MARSHAL'S COURT, and verdict and judgment for the plaintiff; and that *nemo bis pro eodem delicto*, &c.: that this matter had been pleaded in the spiritual court; but that notwithstanding they had proceeded to sentence.

A rule was made to shew cause why, &c.

DR. ANDREWS, a civilian, and MR. NICHOLLS shewed cause upon that rule. The substance of their arguments was, that bawds are by the spiritual law accounted infamous, and their evidence rejected in all cases. That there had been a distinction taken between these words, "You keep a bawdy-house," and "You are a bawd." That the former words might be punishable in the temporal court by indictment, as importing a breach of the peace; but that the latter were punishable in the spiritual court only. A multitude of cases were quoted to prove that an action does not lie in the temporal courts for such sort of words, as "whore," "bawd," &c. (*a*).

Salk. 552.

Then it was argued, that admitting these words were actionable at common law, either in themselves, or accidentally, by reason of some temporal damage sustained by the words, yet this would not oust the spiritual court of their jurisdiction; for that both courts might have a concurrent jurisdiction of the same cause, where they proceed *diverso intuitu*, which was the case here; for the process in the spiritual court is *pro salute animæ et reformatione morum*, that in the * temporal court for *reparation in damages*; and for this purpose the following instances were given. A recovery by

[386]

(*a*) Fitz. N. B. 51. 2. Roll. Abr. 296. 301. 1. Roll. 295. 5. Co. 31. Cro. Eliz. 582. Cro. Jac. 327. Carter, 55. 1. Vent. 220. 2. Keb. 612. Raym. 115. See also 6. Com. Dig. "Prohibition" (G. 14.).

husband

husband in a temporal court of damages against the adulterer, is no bar to a prosecution in the spiritual court at the promotion of the husband (*a*). The statutes prohibiting under certain penalties the clergy to marry without licence, non-residence, and farming, do not oust the jurisdiction of the spiritual court (*b*). In the act of Uniformity, 1. *Eliz.* c. 2. and the late act for preventing of schism, there are special proviso's, that the parties shall not be prosecuted in both courts, and *Exceptio probat regulam in rebus non exceptis (c)*. The same will often be proved in both courts, *viz.* temporal and spiritual; because the proof in the one court establishes it for lands, the other for chattels only (*d*). In *The Register* (*e*) it is laid down as a general rule, that if the principal belong to the spiritual court, the accessory must be tried there too. It is common in temporal courts, in case of the battery of a servant, for different actions to be brought for the same battery; the one by the master, the other by the servant; and damages to be recovered in both; and yet the recovery in the one, cannot be pleaded in bar of the other *(f)*.

SAVIE AND HIS WIFE *against* KIRBY.

It was argued, that the party by standing out thus until sentence, then moving for a prohibition, overturned the proceedings in the spiritual court, and hindered the bringing of an appeal, which by the statute of 23. *Hen.* 8. c. 9. must be brought within fifteen days after sentence.

It was likewise insisted upon, that though it was pleaded, that there was a prosecution in THE MARSHAL'S COURT for the same words, yet it was not said for the same words spoken at the same time, without which the plea can signify nothing.

* An objection was also taken to the suggestion, *viz.* that the wife only prayed to have the prohibition; for though by the practice of the spiritual court, *a feme-covert* may sue singly, yet in the temporal court, both husband and wife ought certainly to join in praying for a prohibition. [387]

As to the custom in *Westminster* it was said, that this was only matter of suggestion in this court, without any affidavit, and never laid by plea before the Court. That besides, there was nothing more pretended in the custom than what generally obtains all over *England*, *viz.* that such sort of persons are generally sent to a house of correction.

The rule was discharged.

(*a*) Salk. 552.
(*b*) Co. Lit. 96.
(*c*) Wingate.
(*d*)
(*e*) Reg. 15.
(*f*)

TRINITY TERM,

The Third of George the First,

IN

The King's Bench.

Thomas *Lord* Parker, *Chief Justice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Pratt, *Knt.*
} *Justices,*

Sir Edward Northey, *Knt. Attorney General.*

Sir William Thompson, *Knt. Solicitor General.*

* The Parish of South Sidenham *against* The Parish of Lamerton. Case 195.

WILLS AND HIS WIFE were removed, by an order of justices, from the parish of *Lamerton* to the parish of *South Sidenham*.

If a person rent a farm in two parishes, of less than ten pounds a year in each, but above that value in both, he shall be settled in the parish where the house is situated.

This order was removed into the court of king's bench.

The case stood thus: *Wills* took a lease of an intire tenement, for the term of sixty years, if he and his wife and the latter should live so long, at the rent of thirteen pounds and ten shillings a year. So much of this tenement as amounted to four pounds a year, was situated in the parish of *South Sidenham*, and so much as amounted to nine pounds ten shillings a year, with the house, in the parish of *Lamerton*.

S. C. Sett. & Rem. 77.
S. C. 1. Sess. Cases, 122.
S. C. 1. Stra. 57.
S. C. Foley, 81.
S.C. 2. Bott. 624.

The question was, Whether this was a settlement within the statute of 13. & 14. *Car.* 2. c. 12.

THE COURT was clearly of opinion that it was; for the words of the statute are, "a tenement of the value of ten pounds a year;" so that the rent was not at all material, and the statute does not say that all the tenement must be in the parish where he lives. So that this is a settlement within the words and letter of the act.

And

THE PARISH OF SOUTH SIDENHAM *againſt* THE PARISH OF LAMERTON.

And as it is within the letter, ſo it is within the intention and reaſon of the act too; for the plain reaſon of the law is this, that it is not probable that a perſon ſhould become chargeable, who has ſo much credit as to be intruſted with the management of a farm of the value of ten pounds a year. * Indeed, if a man take ſeveral diſtinct tenements in ſeveral pariſhes, and both, or all of them, amount to ten pounds a year, this will not make a ſettlement; but here the tenement was one entire and diſtinct tenement.

* [390]

Ante, 287.

EYRE, *Juſtice*, compared this to the caſe, where a man ſerves half a year, then is hired for a year, and ſerves only half that year; which is a ſettlement within the words and meaning of the act; for the words are ſatisfied by the hiring for a year, and ſervice for a year; and the meaning is alſo ſatisfied, becauſe a perſon of that ſtrength as to be hired for a year's ſervice, was not eſteemed by the act a perſon likely to become chargeable, but able to maintain himſelf by his bodily labour.

THE COURT. The ſettlement is at *Lamerton*, and therefore the order of removal to *South Sidenham* muſt be quaſhed.

A perſon cannot gain a ſettlement by reſiding on a leaſehold eſtate, as a *perſonal repreſentative*, unleſs he has *proved the will* or procured *letters of adminiſtration*.

A SECOND QUESTION in this caſe was, Whether the pauper had not gained a ſettlement in the pariſh of *South Sidenham*.

The caſe, as to this point, ſtated, that the mother of *Wills's* wife was poſſeſſed of a ſmall cottage, in the pariſh of *South Sidenham*, for a term of years determinable on the death of her daughter; that on the death of the mother, *Wills* entered upon the cottage in right of his wife; but did not take out letters of adminiſtration to his mother-in-law; but continued to live therein with his wife and family for twenty-five years, and until he removed into the pariſh of *Lamerton*, and took the tenement as above mentioned.

The queſtion therefore was, Whether *Wills* having by law a right to take out adminiſtration, and a right to the ſurplus of the eſtate (debts and funeral expences paid) of the perſon poſſeſſed of the term, as would in law intitle a man to a ſettlement, within the ſtatute of 13. & 14. *Car.* 2. c. 12. had, before adminiſtration actually taken out, ſuch an equitable intereſt, as would in law amount to a ſettlement?

IT WAS RESOLVED, that if a man have two ſettlements, he is to be eſteemed as ſettled in the place where he lives; and although it was in the election of *Wils* to ſettle himſelf in each place, yet it was not in the power of the juſtices to remove him from the place where he lived and was ſettled, to another place where he has likewiſe a right of ſettlement. So that admitting there was a ſettlement at *South Sidenham*, yet if there was a ſettlement in *Lamerton*, the place where he reſided, the order of juſtices to remove him muſt be quaſhed.

The

THE PARISH OF SOUTH SIDENHAM *against* THE PARISH OF LAMERTON.

The question therefore, Whether he had a settlement in *South Sidenham?* being immaterial, THE COURT gave no opinion on it (*a*).

(*a*) It is said, S. C. Sett. & Rem 103. that it was held, that he had not a settlement in *South Sydenham*, for that he had only a right, which was not vested in him until he had taken out administration, S. C. Bott. P. L. 624. pl. 554. And this is confirmed by Rex *v.* Wedworthy, Burr. S. C. 109. Rex *v.* Lower Swell, Burr. S. C. 436. Rex *v.* North Curry, Cald. 137. But the defect of not taking out administration seems cured by his having resided upon the cottage for *twenty years*. See Ashbittle *v.* Wyley, 1. Stra. 608. Rex *v.* Galway, Burr. S. C. 632. Rex *v.* Elton, Burr. S. C. 631.

Hewett *against* Bainard.

Case 196.

If a juror be withdrawn from the panel by consent of both parties, in order that the trial may go off *pro defectu juratorum*, he may be of the jury when the cause comes on again.

A WRIT OF ERROR was brought on a judgment in the court of common pleas.

The single question was, Whether a juror, who was withdrawn from the panel by the consent of both parties, to the intent that the trial might for that time go off *pro defectu juratorum*, may not be of the jury, when the cause comes to be tried at a subsequent time; and if he be, whether that will be error?

IT WAS INSISTED, that it would be error; and that a juror withdrawn from the panel, was for ever after incapable to try the cause. An a case in 3. *Cro.* 430. was much relied upon, which that if a juror who had been once challenged, and the challenge allowed by the Court, should afterwards try the cause, it would be error.

TO THIS *it was answered*, that the case cited was v. ly different from the case at bar; for the case in *Croke*, is the case of a person challenged by one of the parties, as not standing indifferent to both sides, and * this challenge allowed of by the Court, which amounts to a kind of judgment; and therefore as long as it stood, though the cause upon which that challenge was founded, ceased, the person was incapable to try the cause; whereas here the juror is withdrawn from the panel by consent of both sides, for no other reason but that the cause may be put off *pro defectu juratorum*; and therefore a person so withdrawn is to be considered as if he had never been returned; and consequently no more unfit to try the cause than any other. A case in *Fitzherbert (a)* was quoted, where after a challenge to the array, for the partiality of the sheriff, the very same jury was returned by the coroner, and allowed to be well; which case, in the reason of it, was said to be stronger than this; because though a challenge to the array, be upon account of partiality in the returning officer, yet it is upon the consideration the law has, that partiality in the returning officer will produce a partial jury; whereas here, upon the whole record, there

*[391]

(*a*) Fitz. Abr. "Challenge," 121.

Hewet against Bainard.

is nothing that casts the least reflection or imputation of partiality upon the juror; nothing that hinders him from being "*talis*, "*&c.*" If this be error, it would certainly be a good cause of challenge; and yet it is neither a principal challenge, nor to the favour (*a*).

As to the objection, that it shall now be presumed, that there was a good reason for his being withdrawn from the jury, and agreed to by both sides, though the same do not at present appear, it was answered, that the reason why he was withdrawn does appear upon record; and such a reason as does not at all impeach him of partiality, *viz.* the reason was, that it being necessary for the jury to have *a view*, this man happening to be the last upon the panel was withdrawn, that so the cause might be put off *pro defectu juratorum*.

The Court were clear in their opinion, that this man's trying the cause was no error.

The judgment was affirmed.

(*a*) Co. Lit. 157.

* [392]

Case 197. * The Parish of Horton *against* The Parish of Houghton,

If a servant be hired for *eleven months*, and then leave his place for a week, and then is hired for another eleven months, and then again leave his place for a week, &c. these several hirings cannot be connected so as to make a hiring and service for a year.

S.C. 1. Stra. 83.
S. C. Sett. & Rem. 73.
S.C. Foley, 146.

THE CASE, as stated upon the order, was thus: A servant was hired for eleven months; he then went home with his cloaths to his father for a week; afterwards he was hired by the same person for eleven months more; he then went home for a week; and so, &c.

The question was, Whether this was a settlement?

It was insisted, that it was not. It appears by several resolutions, that there must be a service for a year, and a hiring for a year. In the case of *Dunsfold v. Ridgwick (a)*, it was held, that there must be a hiring for a year, as well as a service for a year. In the case of *Overton v. Steephton (b)*, a servant was hired for half-a-year, and served accordingly; then he was hired for a year, and served half-a-year; and though it was resolved that this was a settlement, notwithstanding the service was not subsequent to the hiring; yet still it was held necessary, that there should be a service for a year, and a hiring for a year. In the case of *Frencham v. Pepperharrow (c)*, a servant was hired from the third of *October* to *Michaelmas*, three days short of a year; and then by agreement, he stayed as many days longer as completed the year, and it was held to be no settlement.

(*a*) 1. Salk. 535.

(*b*) Burr. S. C. 549. This case is also imperfectly reported in Fort 316. Ld. Ray. 426. Sett. & Rem. 255. pl. 295. 3. Salk. 257. and 12. Mod. 224.

(*c*) Ante, 293. S. C. Foley, 135. S. C. Fort. 322. But see this case Sett. & Rem. No. 80. page 56.

On

ON THE OTHER SIDE *it was ſaid*, that if this be no ſettlement, the act of parliament is eluded; and there will be no more ſettlements in this pariſh by virtue of it. That the fraud was very apparent from the circumſtances of the caſe; and that it is a rule in pleading, that nothing needs be averred, that appears ſufficiently without. *. That the reaſon upon which this act of parliament was founded, was, that a perſon of that bodily ſtrength as that any perſon ſhall think fit to hire him for a year, is not ſuch a perſon the law preſumes likely to become chargeable. Beſides, ſome regard was to be had to ſervants that they ſhould gain a ſettlement, and not be hurried from place to place.

THE PARISH OF HORTON *against* THE PARISH OF HOUGHTON.

* [393]

Ante, 390.

PARKER, *Chief Juſtice*, was of this opinion.

PRATT, *Juſtice*, *contra*. The law muſt now be taken, that a hiring for a year, as well as ſervice for a year, is neceſſary. I ſee not, but that if this agreement was made purpoſely, by way of caution to prevent a charge upon the pariſh, the intent was lawful, and we have nothing to do with it. Beſides, we cannot judge of fraud; that belongs to the juſtices. We cannot adjudge, that a demand and a refuſal amount to a converſion, though a jury may and will.

Adjournatur (a).

(a) The Court at the end of the Term held, that as the caſe now ſtands, the ſeveral hirings and ſervices that were ſtated could give no ſettlement, S. C. 1. Stra. [illegible]. See alſo Coombe *v.* Weſtwoodhay, 1. Stra. [illegible]. Rex *v.* Weſtwell, 1. Barn. [illegible]. Rex *v.* South Cerney, 2. Conſt's P. L. 4[illegible]6. Rex *v.* Newton, Burr. S. C. 157. Rex *v.* Ham, Burr. S. C. 304. Rex *v.* Syderſtone, Cald. 1[illegible]. S. C. Dougl. 424. *notis*. Rex *v.* Hanwood, Dougl. 423. S. C. Cald. 160. Rex *v.* Murſley, 1. Term Rep. 694. Rex *v.* Martin, 4. Ter. Rep. 257.

MICHAELMAS

MICHAELMAS TERM,

The Fourth of George the First,

IN

The King's Bench.

Thomas *Lord* Parker, *Chief Justice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Pratt, *Knt.*
} *Justices.*

Sir Edward Northey, *Knt. Attorney General.*
Sir William Thompson, *Knt. Solicitor General.*



* [394]

* Parks *against* Crawford.

Case 198.

If notice to produce a prisoner be given to the marshal on a *Friday*, and a demand to see the prisoner made on a turnkey at twelve o'clock on the succeeding *Tuesday*, this is a sufficient notice and demand to maintain an action for an escape against the marshal.

THIS was an action of escape, brought against THE MARSHAL of the king's bench, upon the statute of 8. & 9. *Will.* 3. c. 27. s. 9. the words of which statute are, "That "if the marshal or warden for the time being, or their respective "deputies, shall, after one day's notice in writing given for that "purpose, refuse to shew any prisoner, committed in execution, to "the creditor at whose suit such prisoner was committed, or "to his attorney, every such refusal shall be adjudged an escape in "law."

In this case, the notice was given by the creditor upon the *Friday*, to produce the prisoner upon the *Tuesday*. At twelve o'clock the prisoner was demanded of THE TURNKEY; but not being produced, the action was brought.

This being the state of the case, THE POSTEA was stayed by the direction of *Chief Justice* PARKER, who tried the cause.

* And it was now objected, FIRST, that the notice was insufficient; and that SECONDLY, if the notice was sufficient, the demand and refusal were not alledged as they ought to be. * [395]

It

Parks against Crawford.

It was observed, that this statute was a penal statute; because it subjected the gaoler to make satisfaction to the plaintiff, where possibly the plaintiff was not at all injured: that therefore such an interpretation was to be put upon the act as might not subject the gaoler to unreasonable and unnecessary difficulties. It was likewise observed, that the act of parliament had directed no particular sort of notice; and that consequently the notice, as to the nature of it, must be governed by the rules of common law. The statute is silent as to the place where the prisoner is to be produced; this the law supplies, and says "the prison;" for it will not be pretended, that by this statute the gaoler is bound to produce the prisoner at whatever place the creditor shall please to appoint. So again, as to the time to be specified in the notice for the producing of the prisoner, the act is altogether silent; yet certainly there must be a time specified in the notice; for it will not be pretended, that a notice from the creditor to produce the prisoner generally, without appointing any time, would be good. It will not be pretended, that upon such notice the marshal will be obliged to produce the prisoner a week, a month, a year after, whenever it should please the creditor to demand him; for this would be at once to blow up the rules of the prison, which was certainly never the intention of the act, which, in requiring a day's notice, does evidently suppose the prisoner may possibly have the benefit of the rules. The question now therefore is, Whether the time appointed by this notice be certain enough? or, Whether it ought
[396] not to have been confined to some particular * part of the day; and not said on such a day generally? It was said, that in confining the notice to some particular hour or portion of time in the day, the inconvenience to the plaintiff could be none at all; because he had it in his own power to appoint that time which would be most convenient for him; whereas on the other hand, the marshal would be exposed to the trouble of an unnecessary attendance, as not knowing what time of the day the creditor would demand him. But if it should be said here, as probably it may, that the plaintiff having specified no particular time in the day, the law appoints a time, *viz.* the last hour in that day, unless by mutual consent the parties do it sooner; then, SECONDLY, the demand is faulty, being made at twelve o'clock at noon, when the defendant had until the close of the evening for the performance of it.

8. Mod. 70. 219.

Demand insufficient, in regard to the person upon whom it was made.

A SECOND OBJECTION as to the demand was, in respect to the person upon whom the demand was made, *viz.* the turnkey.

It was observed, from other clauses in the act, that by the word "deputy" was to be understood a deputy-marshal, *viz.* such a deputy as an action may be brought against; and not any inferior officer, as a turnkey, &c. If it should be said, that the deputy-marshal seldom or never attends, and that consequently it would be next to impossible for the creditor to make the demand of the marshal or his deputy, it was answered, that it must be supposed that the marshal or his deputy are attending the duty of their

their office; and that should a creditor not be able, by reason of their absence, to have the benefit of this act of parliament, the Court would punish them for their non-attendance. PARKE against CRAWFORD.

* THE COURT seemed inclined to think, that the marshal * [397] had all that day for the producing of the prisoner. They seemed likewise to think, that by the word "deputy" was to be understood a deputy-marshal, and not a more inferior officer; but that, however, the plaintiff could not suffer by their non-attendance; because a demand at the prison, though nobody was there, would be sufficient.

Adjournatur.

Memorandum. Case 199.

LORD COWPER surrendered the seals in the Vacation.

EASTER TERM,

The Fourth of George the First,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*

Sir Joseph Jekyll, *Knt. Master of the Rolls.*

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[398]

Slingsby *against* ———. Case 200.

THE INTEREST of five hundred pounds was settled to be paid to the wife for life; then the principal and interest to trustees, "to be paid to such daughter or daughters as shall "be begotten upon the body of the wife, share and share alike; "but if the husband shall die without * any daughters, then the "money was to be paid to the wife."

A settlement of money to be paid to such children "as "shall be be-"gotten, &c." but "that if "the husband "shall die "without any "children, then "the said mo-"ney shall be "paid to *A.*" extends to a child *in esse* at the time the settle-ment was made. S. C. 2. Eq. Abr. 658.

At the time of making this settlement, there was a daughter, *Anne*; and the husband died without any other daughter.

IT WAS INSISTED, that this daughter was entitled to nothing under this settlement; because being *in esse* at the time when it was made, she was not within the words of the settlement, which run in the future tense, "as *shall* be begotten upon the body of the "wife, share and share alike."

But PARKER, *Lord Chancellor*, declared, that this was to put the most absurd interpretation upon a settlement that could be supposed, *viz.* that parents should be solicitous for children in *embrio* and unborn, and take no care of a child *in esse*; that the futurity meant by the settlement did not relate to the time of the birth of the daughters, but to the death of the husband; at which time all the daughters then in being, that were the offspring of that coverture, became intitled to the money by this settlement.

Case 201. ——— *against* Mortimer Powell.

If a testator is indebted to his executor for goods in the way of trade, a devise to the executor of a much larger sum than the debt amounts to shall not extinguish the debt.

THIS was a case arising from the will of *John Rawlins*.

The question now reserved for the consideration of the Court, upon a special report of the master directed by the Court, was, Whether a debt of three hundred pounds, due to *Powell* the executrix, should be sunk in a legacy of five hundred pounds given her by the same will?

The bill was brought by next of kin, against the executrix, to have the surplus of the estate, undisposed of by the will, divided according to the statute of Distributions. And the defendant had

* [399] by her answer submitted, * that the surplus should be divided

S. C. 2. Eq. Abr. 354. according to that statute; but insisted upon a debt of three hundred pounds, as what she ought to have satisfaction for, over and above her legacy. The bill did, besides, seek a discovery of the assets of the estate in the hands of the defendant.

Upon this IT WAS DECREED, that the defendant should account for the surplus, which should be divided according to the statute of Distributions; and as to the debt, it was directed, that THE MASTER should look into it, and state both the *quantum* and nature of it.

And now upon THE MASTER's report, who found the testator's debt to the defendant near that sum; and that the debt had sprung from dealings in trade between them;

IT WAS URGED as a known rule and course of the court of chancery, that where a debtor, by his will, gives to his creditor a legacy superior in value to the debt due, the debt was always sunk in the legacy, unless it evidently appear, from strong circumstances in the will, that it was intended otherwise as a beneficial legacy. And this was said to be founded upon that maxim in the civil law, "*Debitor non præsumitur donare.*" This was further enforced from *Chauncy's Case* (a), where it had been so ruled by THE MASTER OF THE ROLLS a Term or two ago.

THIS WAS OPPOSED *by the defendant's Counsel*, who distinguished this from the *case of Chauncy* thus: A servant-maid had lived long in a place without receiving any wages; her wages were at last by the master computed to amount to a hundred pounds, and a bond given for the same; the master soon after dying gave her a legacy of five hundred pounds, which he thus expressed, "for her faithful services." Now it was said, that this bond being for the money due for her service, and this legacy being given her for her faithful services, it was plain, that the testator intended

* [400] * this legacy in satisfaction of all that was due to her.

(a) 1. Peer. Wms. 409.

On

———— *against* MORTIMER. POWELL.

ON THE OTHER SIDE, the cafe of *Cuthbert v. Peacock (a)* was infifted upon, where the contrary was ruled by LORD COWPER, faying, it was good equity to make the teftator both juft and generous, if he intended to be both. This interpretation is moft agreeable to the words of the will, where it is expreffed as a gift. Now a man is never faid *to give* but *to pay* a debt. It was faid further, that fince it may be the executrix would not have been decreed to account for the furplus without her confent, it would be the harder upon her to fink her debt. 2. Vern. 593. 594.

PARKER, *Lord Chancellor*. Let her have her legacy over and above her debt. I have the more compaffion for this executrix, becaufe of her fubmiffion to account for the furplus. I am not fatisfied with that notion, that a legacy to an executor excludes him from the furplus; and therefore without her fubmiffion, I know not whether I fhould have decreed her to account for it.

MR. COWPER upon this told the Court, that the firft time this doctrine prevailed was in the cafe of *Fofter v. Mount (b)*, fince which time there have been feveral decrees in purfuance of it. But that the contrary doctrine had prevailed in the cafe of *Littlebury v. Buckley (c)*, where it was refolved, that notwithftanding the legacy, the executor fhould have the furplus. Indeed, there it appeared by parol evidence, that it was the intention of the teftator that the executor fhould have the furplus; *Lord Guernfey*, for it went up into the houfe of lords *(d)*, being of opinion, *that parol evidence not repugnant to the will, and in affirmance of the rules of common law, fhould be allowed of. Since that cafe, it has * been fo decreed by LORD COWPER, without the help of fuch evidence *(e)*. * [401] Ante, 99. 2. Vern. 593. 594.

(a) Salk. 155.

(b) 1. Vern. 473. S. C. 1. Eq. Abr. 243.—See alfo 2. Vern. 674 677.

(c) 2. Vern. 677.

(d) 1. Bro. P. C. 340.

(e) *Mrs. Fifher* being indebted to *Cranmer* in fifty pounds made him her executor, with a legacy of five hundred pounds, and afterwards borrowed a hundred and fifty pounds more; and HARCOURT, *Lord Chancellor*, reverfed the decree for payment of the legacy and both the debts, for that there was no pretence that the legacy fhould go in fatisfaction of the after-debt, and a court of equity ought not to fay when a man gives a legacy that he pays a debt. Cranmer's Cafe, 1. Salk. 508.—See Thomas v. Burnet, 2. Peer. Wms. 341. 3. Peer. Wms. 353.

Afhton *againft* ————. Cafe 202.

THE QUESTION in this cafe arofe upon the penning of a marriage-fettlement of *Sir Ralph Afhton*, and upon that claufe of it which related to a provifion for younger children. By that claufe, after the creating of a term of ninety-nine years, and vefting it in truftees for that purpofe, it was "PROVIDED, that in cafe he had both fons and daughters, the daughters fhould have a thoufand pounds each, to be paid them at the age of twenty-one, or day of marriage, which fhould firft happen; if there were no fon, and but one daughter, then fhe was to have five thoufand pounds; but Marriage-fettlement. Portions for younger children decreed to be raifed by fale.

ASHTON against ——

but if there were more daughters, then there were to be eight thousand pounds equally divided among them; which sums were to be raised out of the rents, issues, and profits of the estate, "as "soon as they conveniently could."

The father died, leaving three daughters and no son. The three daughters bring their bill to have the eight thousand pounds raised by way of mortgage or sale, and for the interest of the money from the time of their father's death.

2. Vern. 420, 421. 424.

IT WAS URGED *for the plaintiffs*, that there had been many cases where a term being created for the raising of portions for younger children, to be paid out of the rents, issues, and profits of the estate, and not said by sale or mortgage, yet this Court has decreed a sale or mortgage, if that has appeared to be the most convenient way for the raising of it *(a)*. "Profits" is a word of large extent; a grant of the profits of land is, in law, a grant of the land itself *(b)*. It was observed, that this practice of the court of chancery was very rational, and in support of the intention of the parties; because it was for the preferment of daughters in marriage.

* [402] * THE COUNSEL *of the other side* acknowledged, that there were several cases wherein this Court had decreed a sale or mortgage, though those words were omitted; but then they said, that this distinction was to be observed, *viz.* that the court of chancery had exercised this power where, a time being limited for the payment of the portions, it appeared altogether impossible that they could be raised within the time so limited, by the annual profits, rents, &c. but that here no time at all was limited.

THE COUNSEL *for the plaintiffs* replied, that here was a time limited for the payment of these portions, *viz.* upon the death of the father without issue male; for then, says the deed, the portions shall be raised "as soon as conveniently they may," which is in judgment of law presently, from which time the portions are to carry interest.

PARKER, *Lord Chancellor*, was of this opinion, and decreed it accordingly.

(*a*) Stanhope *v.* Thacker, Prec. Chan. 435. 2. Chan. Rep. 204.

(*b*) Ante, 94 365.

Case 203. Target *against* Grant.

If A. devise a term to his son B. during his minority, but if he attains at age ... for his natural life, with remainder to such issue as B. should devise it to, B. takes only an estate for life, with a power of disposing of it to such of his issue as he thinks fit.—S. C. 1. Eq. Abr. 193. S. C. Gilb. Rep. Eq. 149. S. C. 1. Peer. Wms. 432.

A TERM was devised by *William Target* to *Henry* his son during his minority; and if he attained the age of twenty-one years, then it was devised to him for the term of his natural life, and no longer; remainder to such of his issue to be begotten as he

the

the said *Henry* should devise the same unto (*a*); and if he should die without issue, the rest and residue of the term was devised to his brother *Albinus Target*. TARGET against GRANT.

The question was, Whether this was an estate-tail in *Henry*, or not? for if it was, or in the nature of an estate-tail, the remainder to *Albinus* would be void.

IT WAS URGED, that this was an estate-tail by implication; because it was, "and if he died without issue" generally, and not "without issue living at the time of his death."

* IT WAS ARGUED *on the other side*, that this was not an * [403] estate-tail; for though an estate-tail has been held good by way of implication, that was ever in maintenance of the intention of the devisor; whereas here, to make an estate-tail by implication, or an estate in nature of an entail, was to defeat the intention of the devisor, and make that remainder void which he intended should be good. Cases quoted in argument of the case: *Popham v. Bamfield* (*b*), *Peacock v. Spooner* (*c*), *Loddington v. Kime* (*d*).

PARKER, *Lord Chancellor*. *Henry* by this will takes only an estate for life, with a power of disposing of it to which of his issue he thinks fit; the words "no longer" plainly shew this to have been the intention of the testator. Where an entail is created by implication, it is ever in favour of the heir at law; to whom no estate being given by the will, so as to enable him to take by purchase, and there being a necessity, if he takes at all, of his taking by descent; therefore to support the intention of the testator that the heir should take, the law creates by implication an estate-tail in the ancestor, to vest it in the issue by descent. But here this reason entirely ceases; for here is a provision how it shall go to the issue, *viz.* by the devise of the party; until when nothing vests in the issue. The words "dying without issue" are capable of two senses (*e*), *viz.* a legal one, and a vulgar one: a legal one, wherein a man is said to die without issue whenever his issue fails, though some ages after the death of the party; and in this sense, for the support of the intention of the parties, the words shall be understood; but never for the destruction. The vulgar acceptation of the words, which I embrace here, is, "dying "without issue living at the time of his death." The case of *Loddington v. Kime* (*f*) is wrong reported by *Levinz* (*g*), though of Counsel in it; but as to this point it is right enough, and a strong case (*h*).

(*a*) See 1 Peer Wms 432.
(*b*) 1 Vern. 79 167 344.
(*c*) 2 Freem 114. 2 Vern 143 195.
(*d*) 3 Lev. 431. 1. Ld Ray 203. Salk. 224
* (*e*) See Nichols v Hooper, 1. Peer. Wms 564.
(*f*) 3 Salk. 300.
(*g*) 3. Lev 431
(*h*) See Atkinson v Hutchinson, 3. Peer. Wms 260 and Mr Cox's references at the end of the case.

Case 204.

* Nab *against* Nab.

If *A.* devise all her personal estate to *B.* to be disposed of as *B.* shall think fit, and add by parol, "You may, if you please, give 100l. to my niece;" *B.* on a bill in the answer to which the parol declaration is admitted, shall be decreed to pay the 100l. to the niece.

ONE OF THE POINTS IN THIS CASE, besides matter of account, was this:

A daughter devised all her personal estate to her mother, to dispose of as she should think fit; and then adds, by word of mouth, "You may, if you please, give one hundred and eighty pounds to my niece; but I leave it entirely to you."

The niece brings her bill for this one hundred and eighty pounds, and likewise suggests a secret trust in the mother as to the one hundred and eighty pounds.

The mother in her declaration owns the will, and the parol declaration of the daughter; and that she once had it in her thoughts to have made the one hundred and eighty pounds two hundred pounds; but that the niece had since behaved herself so, that she was now resolved to give her nothing.

It was proved in the cause for the plaintiff, that the daughter, after making the will, had said, she had left her niece, the plaintiff, one hundred and eighty pounds as a legacy. But the parol declaration of the daughter appeared only by the answer of the defendant upon oath.

The case of *Kingsman v. Kingsman (a)* was chiefly insisted upon for the plaintiff. There the plaintiff thought fit to disinherit his son in favour of a waterman who had the good fortune to be of his name; and then tells the waterman, if his son should behave himself respectfully to him, and not disturb him in the enjoyment of his estate, he might, if he thought fit, give him twenty or forty pounds a quarter: and here, though an ejectment was brought at common law by the heir for the whole estate, and after that a bill in equity, yet the waterman was by this Court decreed to pay the forty pounds a quarter. It was likewise held in this case, that if the statute of Frauds be not insisted upon, the Court will compel the performance of an agreement, though not in writing.

* [405] * PARKER, *Lord Chancellor.* There is no colour for this to be looked upon as a legacy; because not in writing within the time appointed by the act (*b*). The mother is to be esteemed as a trustee for the niece. It is not necessary, by the statute of Frauds, for a trust, that relates to the personalty, to be in writing; if it were, it is now in writing by the answer. This is not such a trust as not to be forfeited; but then the mother should have assigned some particular instance of misbehaviour in the niece, and not in general only. The mother must pay the one hundred and eighty pounds, but without interest. As there is no proof of the parol declaration of the daughter but by the answer of the mother, the

(*a*) 2. Vern. 559.

(*b*) Six days.

answer must be taken entirely as it is, and no part of it must be impeached by any other evidence.

NAB against NAB.

Memorandum.

Case 205.

IN this Term, PARKER, *Chief Justice* of the Court of King's Bench, was made Lord Chancellor, and SIR JOHN PRATT, *Knight*, succeeded him as Chief Justice.

FORTESCUE, *Baron*, came down into the Court of King's Bench, and was succeeded by SIR FRANCIS PAGE, *Knight*, the King's Serjeant.

NORTHEY, *Attorney General*, was removed from his office, and was succeeded by NICHOLAS LECHMERE, *Esquire*.

TRINITY

TRINITY TERM,

The Fourth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Justice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Fortescue Aland, *Knt.* } *Justices.*
Nicholas Lechmere, *Esq. Attorney General.*
Sir William Thompson, *Knt. Solicitor General.*

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* [406]
Case 206.

* Thornby *against* Fleetwood.

A *common recovery* suffered by a papist tenant in tail, for the purpose of making a marriage-settlement is good; for he is not a purchaser within the statute 1. *Jac.* 1. c. 4. s. 6.
Ante, 113. 356.
S. C. Comy. Rep. 207.
S. C. 1. Stra. 318.
S. C. 2. Bro. P. C. 203.

JUDGMENT being given for the defendant in the court of common pleas, and a writ of error brought in the court of king's bench,

SIR THOMAS POWYS argued for the plaintiff in error to the following purpose: The great and chief, though not the only question in this case is, the construction that is to be put upon the statute 1. *Jac.* 1. c. 4. It will be material to reflect a little both upon the end of this act of parliament, and the time when it was made. As to the end and design of it, It is plainly levelled against popery, and to secure and preserve the reformed religion. As to the time when it was made, Every one conversant in our history knows the continual struggles between the popish and protestant interest, in the time of *Queen Elizabeth*. And the education of youth in popish seminaries being thought at that time a thing of dangerous consequence to the protestant religion, it was * provided against by an act of parliament in the time of *Queen Elizabeth*; but that act of parliament proving insufficient, this act of parliament, upon which the present question depends, was made in the first session of the first parliament of *King James the First*. It is not therefore to be supposed that this statute, relating to a matter

* [407]

Tapperr against Brattwood. matter the parliament shewed such an immediate concern for, should come into the world still-born, without life and energy. This act of parliament consists of two parts: By the first, the *Roman* Catholics are disabled from acquiring anything new, by the second, they are disabled to retain what they are already possessed of. The present question depends upon the first of these. It will not be denied, but that the words in the act (if the savings, to the posterity, and in case of conformity, were out of the way) are full and comprehensive enough to prevent any estate vesting in *Roman* Catholics. It was resolved in *Lord De La War's Case* (a), that he never was a baron, and yet the words are not stronger than these in this act. It must likewise be granted, that papists are disabled from taking any manner of way, by statute of 11 & 12. *Will.* 3. c. 4 and yet the words there used are not stronger than those used in this. The same words are used in statute 31. *Eliz.* c. 6. for prevention of simony. Now the interpretation always put upon this act has been, that whoever came in simoniacally by induction gained nothing. A simoniacal contract has ever been esteemed a good defence to an action brought for tithes. The words of the act, as to the saving to the heir, are, "in respect of "himself only, but not his heirs or posterity." Hence it is argued, that the estate must vest in the ancestor, or else the saving to the

* [408] posterity will be frustrated. * In answer to this objection it is proper to observe, that this clause relates equally to goods, chattels, terms for years, cases wherein the heir is not concerned, as well as to inheritances descendible to the heir, that therefore the same interpretation ought to be put upon the act in both cases. Now it is plainly absurd to understand the act of taking the profits of goods, money, &c. It is a general rule, that *Exceptio probat regulam in rebus non exceptis*, the saving, therefore, the right of the heir works more strongly and totally to the exclusion of the ancestor. Another rule to be observed in the interpretation of statutes is, that a saving or an exception in a statute must never be so interpreted as totally to destroy the purview. Now here the Counsel for the defendant are endeavouring, in favour of the heir (a secondary consideration of the parliament), to overthrow the primary and principal intention of the act, *viz.* the disabling of the ancestor. But then it will be asked, What is the use of the saving clause? To this it may be answered, First, that it was to shew that the incapacity was only personal, worked no corruption of blood, &c. Nor is it any objection against this, that in this respect it is entirely unnecessary, for saving clauses are often inserted in acts of parliament for the satisfaction of ignorant people. Secondly, The heir is by this means enabled to derive his title from the father, though never seised, as if he had actually been seised. The interpretations contended for by them, that invests the *Roman* Catholic with such an interest in the estate as will enable him to alien and dispose of the estate, by recovery, &c. at

(a) 11 Co. [illegible]

pleasure,

pleasure, but restrains him only from taking the profits, is such a one as can neither be collected from the words or design of the act. * It has been before observed, that these words, "take, "enjoy, &c." are extended to goods and chattels as well as inheritances; and that this being one entire clause, ought to receive an uniform interpretation; but this interpretation of theirs, when applied to chattels, is plainly absurd. Besides, this interpretation is plainly contrary to the words of the act, which are universally exclusive, without any exception or qualification whatsoever; whereas, according to this interpretation, he must inherit, he must take, and be owner; and as such, alien and dispose at pleasure, by fine, &c. If the question is asked them, Who shall take the profits? they are much at a loss; a plain argument that their interpretation was never thought upon by the law-makers, who otherwise would in plain and clear terms have told us who should take the profits, as they have done in the following act of 3. *Jac.* 1. c. 5. The act therefore being silent in this case, they tell us, that according to the rules of law in other cases, the crown shall take them. But this is to bring the act to just nothing; for it is clear law, that alienation before seisin will oust the crown of this interest they are so liberal in bestowing upon it (*a*). But then however we are told, that the landed interest of the papists will be lessened should they thus alien; which is a very odd way of putting people into estates, in order to get them out afterwards. Our interpretation supports the intention of the act, inasmuch as it plainly discourages parents from sending their children for education into popish seminaries; since by that they are cut off from their country, and made *quasi* aliens and outlawed persons. Their construction is directly contrary to all rules of interpretation observed in acts of the same nature; and that whether this act be considered either as an act made for the advancement of religion, or as an act * made for the suppressing of public mischiefs, and promoting the public good. In *Hobart*, 157. we are told, that acts of parliament made for the advancement of religion shall, in support of that intention, be stretched even beyond the words. Now here the words are plainly with that interpretation that best supports the intention of the act. In 11. *Co. Rep. fol.* 7. several instances are put of acts of parliament made for the advancement of religion, that have had a large and liberal interpretation put upon them. In *Poulter's Case* (*b*), instances are given of acts of parliament which, though criminal ones, have yet been extended by equity, because made for suppressing of public mischief, and the advancement of the public good. It cannot be doubted but that the act of parliament we are now upon deserves a large and liberal construction, upon both these accounts. Their interpretation is contrary to the rule of the civil law, which is, *In dubio hæc legis constructio, quam verba ostendunt.* And none but lawyers would ever have thought upon a different interpretation

Margin: Fi... * [409] — Ante, 352. — Salk. 395. — * [410]

(*a*) Raym. 17. 5. Mod. 101. (*b*) 11 Co. 34.

from

THORNBY against FLEETWOOD.

from that which we put upon it. It is pretended, that their interpretation is made in favour of the heir; but yet by this means the anceſtor is enabled to alien, and ſo diſinherit the heir; which, if a proteſtant, he will moſt certainly do. But it will be demanded of us, Where is the eſtate during the life of the perſons thus diſabled? Here I anſwer, in the firſt place, that moſt certainly it ſhall not be in the perſon diſabled, if there is a poſſibility that it may be elſewhere, *Maledicta expoſitio quæ corrumpit textum*. It is a rule in the interpretation of ſtatutes, that whatever is a neceſſary and
* [411] unavoidable conſequence * of an act of parliament, is as much a part of that act as if inſerted *totidem verbis* in the act (*a*). There is another rule to be obſerved in interpreting acts of parliament, *viz.* That where any point is plainly and directly enacted, ſuch an interpretation muſt be held as to render the plain deſign of the act practicable, notwithſtanding the rules of common law ſhould be hereby overthrown; for it is the proper buſineſs of acts of parliament to make alterations in the common law. Though at the ſame time it muſt be acknowledged, that an act of parliament ought to be interpreted by the rules of common law, as far as is conſiſtent with the preſerving the end and deſign of the act. In the next place I anſwer, that if the land never veſted in the party himſelf, as we ſay it did not, the king cannot have it (*b*). In the third place I anſwer, it cannot go to the iſſue of the perſon diſabled, according to that maxim of law, *Non eſt hæres viventis*. Therefore it muſt neceſſarily go to him in reverſion; as in caſe of an eſtate-tail, upon failure of iſſue it reverts to the donor and his iſſue; or in caſe of a fee-ſimple, it ſhall eſcheat to the lord and his heirs, of whom the land is held. But it is objected, if the land is to go over to him in reverſion, how can the anceſtor have it back again in caſe he conforms, as it is plainly provided by the act that he ſhall? To this it may be ſaid, that the meaning of that clauſe in the act is not, that upon conformity he ſhall have back what is gone over and veſted in another, but that the incapacity being removed by his conformity, he ſhall, from the time he ſo conforms, be capable of inheriting whatever ſhall fall to him in a courſe of deſcent, as if he had never been diſabled. But ſuppoſing, for the encouraging of conformity, that the act ſhould look backwards,
* [412] and give him that * inheritance which would have veſted in him but for this incapacity now removed; is it ſtrange or difficult to conceive, that an act of parliament may do it? If an act of parliament repealing an act of parliament be repealed, the firſt act is conſequently ſet up again. It appears from the *caſe of the Prince of Wales* (*c*), that for a ſtate of inheritance to veſt and reveſt is not a new thing upon an act of parliament. It is ſaid (*d*), that an act of parliament can create an eſtate-tail without a donor; and when we ſee eſtates limited for a particular purpoſe, we are not to meaſure the validity of ſuch limitations by the ſtrict rules

(*a*) Hob. 293. Bro. Abr. "Corone," 204.
(*b*) Co. Lit. 13.
(*c*) 8. Co. 31.
(*d*) Raym. 355.

of the common law; for the parliament can control the rules of common law (*a*). It can make an estate of freehold to cease, as if the party were dead; as in case of a parson who accepts a second benefice, contrary to the statute of 21. *Hen.* 8. of Pluralities (*b*). And for this cause *Lord Hobart* says (*c*), "that judges have authority to mould statute-laws according to reason and best convenience, to the truest and best use;" especially considering, that the parliament proceeds many times according to natural equity, *secundum equum et bonum*, which is *lex legum*, without respect to legal ceremonies (*d*). So that where the drift and sole intent of an act of parliament is most plainly discerned, as in this case, and yet that intention cannot be observed, were the same in a deed, by construction according to the rules of law, we ought rather to presume, that the parliament, in whose power it was so to do, resolved to leap over and waive the mechanical rules of law, and to make a particular law for that occasion. *Beaumond's Case* (*e*) is put by *Hobart* thus: *John Beaumond* and his wife being seised in special tail, remainder to *John Beaumond* in fee, he alone levied a fine to *Edward the Sixth* in fee, which estate came to the *Earl of Huntington* in fee; *Beaumond* having issue died; * his wife entered; the *Earl of Huntington* confirmed the estate in the wife, *habendum* to her and the heirs of the body of her and her husband: and it was ruled, that the confirmation wrought nothing, because she had as great an estate before; and also the issues could not be made inheritable, which were before barred by their father's fine, and the estate-tail as against them lawfully given to another. And it was further resolved, by way of admittance, that if that remainder in fee had not been to *Beaumond* himself, but to a stranger, the entry of the wife had restored that remainder to the stranger, and had left nothing in the conusee but a mere possibility; so she hath the tail not only for herself, but to the benefit of other estates growing out of the same root with his; and yet during the life of *Beaumond*, the entail had been barred, and all had been in the conusee, and the wife had had nothing but a possibility *via versa*. And upon this case *Hobart* observes, that an estate-tail may cease for a time, and rise again, and he in reversion may enter during the cesser of the estate-tail. In *Littleton* (*f*) there are cases put where, by the common law, both freehold and estates-tail shall be in abeyance, *viz. in nubibus*, in consideration only of law, for a time, or, in other words, shall cease for a time. If a tenant in tail grant "all his estate" to another; *quoad* his issue, this works no discontinuance; but *quoad* himself, the reversion is in abeyance, for he shall have none left in him against his own grant (*g*). If tenant in tail of lands holden of the king be attainted of felony, and the king after office seizeth the same, the estate-tail is in abeyance (*h*). If a lessee for life become professed, there shall be no occupancy,

Tenant [illegible] against Freeman [illegible]

* [413]

Ante, 360.

(*a*) 13. Co. 64.
(*b*) 6. Co. 40.
(*c*) Hob. 346.
(*d*) Hob. 224.
(*e*) Hob. 257. and reported 9. Co. 140.
(*f*) Co. Lit. sect. 646, 647. 649, 650.
(*g*) Litt. sect. 613.
(*h*) Co. Lit 345 a.

Thornby against Fleetwood.

occupancy, but the lessor may enter, for he is dead in law; but, upon his deraignment, the lessee may re-enter * upon the lessor, to whom the land went during his profession (a). If a tenant in tail die (his wife enfient with a son) without issue, the donor may enter; but upon the birth of the son, the estate-tail is set up again (b). As in that case, the expectation of the birth of a son did not prevent the going of the estate to the donor; so by parity of reason, the expectation of conformity in our case will not hinder the estate from going over to him in reversion. In case of a fee-simple, where the uncle enters before the birth of a child, that after-born child is not entitled to the mesne profits. In like manner in the spiritual court, in case of a divorce *à vinculo matrimonii* the husband is not answerable for the mesne profit of his wife's estate. But the life of *Philip* is objected to us, and we are told, that he in reversion can never enter while there is issue of the tenant in tail alive. To this I answer, that the ground upon which this objection is founded is much too large; for according to *Hobart* (c), 345, 346. and *Sir Nicholas Carew's Case* (d) is quoted for it, it is not enough to keep out the reversioner, that there is issue, unless this issue be heir; as in case of the attainder of the ancestor. Now *Philip*, though he is issue, yet is not such an issue as can inherit; and therefore is no more an heir in tail than a man can be said to be heir in the life-time of the father. Nay, it is not enough that there be issue, or an heir of the body; nay, and that he may possibly inherit; but he must be then inheritable, or else it will go to the reversioner. If lands be given to a man, and the heirs male of his body, and the man has issue a daughter, who has issue a son, here this son is both issue and heir, and yet is not inheritable, because his * title must be conveyed through all males; therefore the reversioner must have the lands (e). Where a person is incapacitated to take by descent, because he is attainted, or an alien, or a monk, if this incapacity be taken off, by pardon, by naturalization, deraignment, he shall have the land; but yet the possibility that this incapacity might be removed, at the time when the descent happened, cannot hinder the reversioner from entering; so neither can the possibility of conformity hinder the reversioner from entering in our case.

Afterwards this case went up to the house of lords, and in the printed case delivered by the defendant, the strength of the objection arising from the life of *Philip*, who by the special verdict was not found to be without issue, is thus expressed: "Unless it appear that there "is a good title in the lessor of the plaintiff, the plaintiff cannot "recover, whether the defendants have any title or not; for the "plaintiff must always recover by the strength of his own title, "not the weakness of the defendant's. It seems very strange, and "repugnant to all the rules of law, that there being an estate-tail

(a) 2 Roll. Abr 150.
(b) Bedford's Case, 7. Co. 8.
(c) Hob. 345, 346.
(d)
(e) Co. Lit 24, 25.

"created

"created to the heirs males of the body of *Thomas* first *Lord* "*Gerrard*, and there being issue of that entail yet in being, who "may also have issue male, the *Duchess of Hamilton* should claim "by virtue of the remainder to the right heirs of CHARLES *Lord* "*Gerrard*, who settled the estate, while that estate-tail hath a "continuance; her remainder being to take place upon the death "of *Lord Thomas* and all his issue male. And it seems still more "difficult for her to do this under an act of parliament, which is "so far from giving anything to her, that it expresly preserves the "right of the offender's posterity (which is endeavoured to be "prevented and destroyed by her), and that in the very clause that "lays the disability upon the ancestor. * And although there be "a present disability in *Philip*, yet it is but personal; and the "estate-tail must continue in him, for the benefit of the issue, "which, admitting he had none, he still may have." * [416]

THORNHILL against FLEETWOOD.

TRINITY TERM,

The Fourth of George the First,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Chancellor.*
Sir Joseph Jekyll, *Knt. Master of the Rolls.*

Willis *against* Lucas. Case 207.

J. S. had three sons, *A. B. C.* and daughters; and being seised in fee of land, part whereof was gavel-kind, devised it by his will to *C.* his youngest son, he or his heirs paying ten pounds a-year to *A.* ten pounds a-year to *B.* so much a year to the daughters, &c. for the term of his life; and after the death of *C.* and his wife, then it was to go to the sons and daughters of *C.* according as he should have one or other, equally to be divided between them.

If a testator devise his land to his youngest son, he or his heirs paying 10l. a-year to his other children during his life, and after the death of the youngest son and his wife, then to the children of such youngest son, the wife, on the death of her husband, shall take an estate for life by implication; for the testator, by giving an annuity to his other children, meant to exclude the heir at law.

S. C. 1 Peer. Wms. 472. S. C. 2. Eq. Ab. 343. 360.

C. dies, living his wife; his wife enters, as conceiving it a devise by implication to her for her life. The heir at law, supposing the land not at all disposed of by the will, during the intervening time between the death of *C.* and the death of his wife, and that it ought, therefore, in the interim, to descend to him, brought his ejectment at common law; but the wife protecting her estate by mortgage, nonsuited him.

He therefore now brought his bill to discover these incumbrances, and whether they were not satisfied.

The wife in her answer insists, in the first place, that this is a devise to her by implication for life: and secondly, that though, by the rigorous rules of law, this should not be so, yet that this estate being her chief dependance, and her father-in-law having often told her before the making of his will that he would give it her for life, and having likewise after the making the will declared that he had done so, she hopes the plaintiff shall not have the aid of a court of equity to get that from her which her father-in-law so plainly designed to give her.

WILLIS *against* LUCAS.

FOR THE PLAINTIFF. * The difference taken in the Year-Book 13. *Hen.* 7. and 2. *Cro.* 75. as to estates by implication, *viz.* that where the estate is devised after the death of the wife to the heir at law, there the wife shall take by implication; but not where the devise is over to a stranger; was insisted strongly upon in favour of the plaintiff. As also the rule laid down in the case of *Gardiner v. Sheldon* (*a*), that an estate should never be raised by implication, unless where it was a necessary and unavoidable one.

2. Vern. 572.

IT WAS URGED *in favour of the wife*, that by a necessary implication, in the meaning of the law, was not to be understood a natural necessity that the estate could go no where else, but a necessity arising from the plain intention of the testator in his will. It was also urged, that the heir at law, by having ten pounds a-year given him, when by law he was entitled to the whole, was evidently, by the intention of the testator, as much excluded from having the land descend to him in the mean time as if the devise had been to him after the death of *C.* and his wife; that if the land should descend to the heir at law, it would not in him be subject to the payment of the annuities, which would be plainly contrary to the intention of the testator. It was also insisted upon, that part of these lands being in *Kent* must be taken to be in the nature of gavelkind, and then all the sons and their representatives make but one heir, in which case the descent must be entire: but this cannot be; because as to a third of the land, the representative of *C.* being heir at law, and the person to whom the devise is made, it will be a devise of that by implication to the wife, according even to the rule insisted upon by the other side. * Then there remains two-thirds to descend, which will be a descent neither by custom, nor by the common law: not by the custom, for that is already broken in upon by the estate by implication raised by the will; not by the common law, for these two-thirds must go to the two sons, or their representatives, and the representative of *C.* And here again the wife must have, by virtue of their own rule, an estate by implication in the third part of the two-thirds; because the devise is to the representative of *C.* heir at law, according to this way of taking it, of a third part of the two-thirds.

* [418]

PARKER, *Lord Chancellor*, was of opinion, that the wife ought to have an estate for life by implication, the heir at law being excluded by the annuity.

But this being matter triable at law, he directed an issue accordingly, where the wife was ordered to waive her incumbrances, and insist only on her title at law.

Parol evidence was offered to prove the intention of the testator to give it his wife; but the chancellor refused to receive it.

[...] regard to he [...] parol de[...]tions in a [...]ise of land.—2. Vern. 98. 337. 339. 624, 625.

(*a*) 1. Eq. Abr. 197. Vaugh. 259. 2. Keb. 781. 1. Freem. 11.

MICHAELMAS

MICHAELMAS TERM,

The Fifth of George the First,

IN

The Court of Chancery,

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joseph Jekyll, *Knt. Master of the Rolls.*

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*[419]

* Marks *against* Marks. Case 208.

THE TESTATOR by his will, bearing date on the twelfth day of *April* 1697, devised land to his wife *Anne* for life, remainder to his second son *Daniel* in fee; provided and nevertheless, that if his third son *Nathaniel* should, within three months after the death of the wife, pay the sum of five hundred pounds to *Daniel*, his executors or administrators, then he devised it to *Nathaniel* and his heirs.

If *A* devise land to *B*. for life, with remainder to *C*. in fee, provided, that if *D*. pay 500l. to *C*. his executors or administrators, within three months after the death of *B*. that then *D*. and his heirs shall have the land, and *D*. die in the life-time of *B*. yet if the heir of *D*. pay the 500l. to *C*. within the three months after the death of *B*. he shall have the estate.

Nathaniel died in the life-time of the wife; afterwards the wife died, and *Daniel* entered.

The question was, Whether the heir of *Nathaniel* should be allowed to perform the condition, by payment of the money, and so be let into the land?

The reason why this, being a point purely at law, came to be spoken to in a court of equity, was, that by reason of marriage-settlements, mesne incumbrances, &c. it became uncertain to whom the heir of *Nathaniel* (admitting by law he might perform the condition) was to make the tender: and therefore he brought his bill in equity for relief and direction; which bill was filed within the three months limited for the performance of the condition.

*[420]

*This Term PARKER, *Lord Chancellor*, assisted by SIR JOSEPH JEKYLL, decreed in favour of the plaintiff.

S. C. 1. Eq. Ab. 106.
S. C. Prec. Ch. 486.
S. C. 1. Stra. 129
1. Atk. 394.
Fearn. 303. 313

SIR JOSEPH JEKYLL spoke first to the following effect: The question at law to be resolved in this case, before any decree can be made, is, Whether the plaintiff, as heir of *Nathaniel*, can enter

Marks against Marks.

enter upon the estate upon payment or tender of the money? I am of opinion that he may; and that this is an act not personal to *Nathaniel*, but what may be performed by the heir. If this had been a condition, the law had been plainly so. So is *Litt. sect.* 334. Feoffment upon condition, that the feoffor shall pay such a sum at such a day, &c.; feoffor dies before the day, &c. yet the heir, though not mentioned, may tender, &c. Nay held, *sect.* 336. that a second feoffee, who has only a privity of estate, may do it. But this is not the case of a condition, but of an executory devise. In the case of a condition, the heir has a right antecedent to the performance of the condition; and he does not gain a new estate, but revests an old one by the performance of the condition. *Cujus contrarium verum* here; for upon performance of the condition, the payment of the money (to speak in the language of the law), a new created estate vests in the heir. *Co. Lit.* 219. *b.* Lord Coke's words are these, "That a condition which is to create an estate is "to be performed, by construction of law, as near the condition "as may be, and according to the intent and meaning of the con-"dition, albeit the letter and words of the condition cannot be "performed." The case before us is a case upon a will, where the law has ever allowed the greatest latitude of construction in support of the intention of the testator. Nobody can doubt but that the intention of the testator was to give the land to *Daniel* only in the nature of a security for five hundred pounds, and that [*421] *Nathaniel* was to have the fee-simple. * I am of opinion, *Nathaniel* had such a future interest or possibility in the inheritance as might descend to the heir, though it never vested in the ancestor. *Lampet's Case* (*a*) is an express authority, that a future interest in a term shall go to the executor; and it seems to me to fall in with the reason of that case, that a future interest in an estate of inheritance should descend to the heir. Before the statute *de Donis*, the donor had but a possibility, barrable after issue, at the pleasure of the donee; but yet this possibility was descendible to the heir (*b*). A case is put (*c*), where the heir shall be in by descent of an estate, which could never vest in the ancestor during his life. Land given to *A.* and *B.* so long as they live jointly together, the remainder to the right heirs of him that dieth first; *A.* dies, the heir of *A.* shall have the land by descent; and yet the remainder did not vest during the life of *A.* for the death of *A.* must precede the remainder. In the case of *Oates v. Frith* (*d*) it is said, that the heir is in representation in point of taking by inheritance *eadem persona cum antecessore*. That the law is the same in case of an act executed by way of use is plain, from the third point in *Shelley's Case* (*e*). And the rule there laid down is applicable here, *viz.* that the heir shall be in by descent, where the land might possibly have vested in the ancestor. The case of *Spring v. Cæsar* (*f*) is a strong case to prove, that in a conveyance by way of

(*a*) 10. Co. 46.
(*b*) 2. Inst. 335.
(*c*) Co. Lit. 378.
(*d*) Hob. 130.
(*e*) 1. Co. 98. a.
(*f*) 1. Roll. Abr. 420. 469.

use

use the heir may pay the money, if the anceſtor died before the day. As to the caſe of *Bret v. Ripden* (a), that is not applicable to this caſe. For there was no complete deviſe; becauſe the anceſtor to whom the deviſe was made dying in the life-time of the deviſor, there was no deviſee at the time when the will was to take effect: but here there * is a complete deviſe, and of ſuch an intereſt or poſſibility as might have veſted in the anceſtor. But it is objected, that the heir has his election whether he will pay the money or not. True; but as this election is in favour of the heir, it ought not to be turned to his prejudice. The four reaſons given by *Lord Coke*, in his *Commentary upon Littleton* (b), are all applicable to the caſe in queſtion; I am therefore of opinion, that the heir may pay the money, and ſhall take the land as an executory deviſe, and by way of deſcent. And though before the caſe of *Lloyd v. Carew* (c) it ſeems to have obtained for law, that no executory deviſe of a fee upon a fee ſhould be allowed of, unleſs upon a contingency to happen during the life of one or more perſons in being at the time of the ſettlement; and conſequently the limitation to *Nathaniel* would have been void, becauſe dependant upon a contingency to happen within three months after the death of the wife; yet ſince that caſe, which went through the houſe of lords, and is reported *Shower's Caſes in Parliament*, 137. the law is now ſettled, that in caſe of a contingency that cannot in the nature of it precede the death of a perſon, a reaſonable time may be allowed ſubſequent to the deceaſe of that perſon for performance of the condition; and a fee limited thereupon is good. In that caſe, a year was held no unreaſonable time; *a fortiori* not three months, which is the preſent caſe. The plaintiff has good equity to be directed and indemnified in the payment. Marks v. Marks. [422]

PARKER, *Lord Chancellor*. I am of the ſame opinion with the MASTER OF THE ROLLS; and in what view ſoever I conſider the preſent queſtion am the more confirmed in it. Though the words of the will are only, "that *Nathaniel* ſhould pay," and not *Nathaniel* and his heirs, yet this is only a plain miſtake in the will, which is a conveyance that the law ſuppoſes to be made when a man * is *inops conſilii*, and therefore allows great favour to be uſed in its conſtruction. The plain intention of the teſtator was to provide for his children; to the one he intended to give five hundred pounds, to the other the land. At common law, if *A.* had made a feoffment to *B.* for life, remainder to *C.* in fee, upon condition, that if *B.* ſhould pay ſo much money to *C.* that then *A.* ſhould have the land; *A.* has a right to take advantage of the performance of the condition, which right veſts in *A.* the anceſtor, and is in its own nature deſcendible to the heir, but not aſſignable. If *Marks* the teſtator had made a feoffment to *Daniel*, upon condition, that if the teſtator ſhould pay ſo much money to *Daniel*, then *Nathaniel* ſhould have fee; this is a condition, the right of Ante, 420. [423]

(a) Plowd. 341.
(b) Litt. ſect 334.
(c) 1. Eq. Abr 260. Prec. Ch. 106. Shew P. C. 137.

MARKS against MARKS.

performing which descends to the heir of the testator, and the heir would be at liberty to take advantage of it; for the limitation of the fee over to *Nathaniel* would be void, by a particular maxim of the common law, which will not allow a fee to be limited upon a fee (*a*); or by that other maxim, which excludes a stranger from taking advantage of a condition. Since the statute of Wills (*b*) and statute of Uses (*c*) executory devises and springing uses have been allowed of. These were first allowed of with respect to the testator or party himself; afterwards it came to be allowed of to other persons. And therefore at this day, in devises and limitations of uses, an estate may be limited over to a third person, upon the defeasance of a former estate in fee, if the condition be not too remote in point of time. And though there have been words found out to save, in appearance, the maxims of the common law; yet in effect and in truth, the very benefit and advantage of the condition is passed over to a third person, notwithstanding the maxim of law, that a stranger cannot take advantage of a condition.

[424] * In this will the case is nothing but this: The testator gives the land to *Daniel*, redeemable upon the payment of five hundred pounds; and he gives the equity of redemption to *Nathaniel*: *Nathaniel*, therefore, seems to me to have an equity of redemption that remains open to him in a court of equity as well after the time limited as before. Indeed, there might have been a difference between this case and the case of a common mortgage (where, though when the day is past, and so the legal estate is absolutely vested in the mortgagee, yet in equity a right to redeem remains) had *Nathaniel* been here to come for relief against the heir at law: but this is not the case; for he comes for relief against a third person, who had the estate vested in him for no other purpose but to make the estate redeemable. The question that remains is, Whether this advantage be not lost by the death of *Nathaniel* before the day? which imports these two objections: FIRST, That the payment of this five hundred pounds is personal to *Nathaniel*; and therefore not to be performed by anybody else. SECONDLY, That the contingency should have happened in the life-time of the ancestor; for the heir is not to take by purchase, but by descent.

As to the first point; I am of opinion, that this is an act not personal to *Nathaniel*. Payment of a small trifling sum may be considered rather as a ceremony than a valuable consideration; and this I take to be the ground upon which the two Judges went, who, in the case of *Spring v. Casar* (*d*), held the payment of the ten shillings to be a personal act; for when the sum comes to be considerable, as here it is five hundred pounds, the payment of it is never esteemed a personal act: and this appears throughout

[425] *Englefield's Case* (*e*). * The section of *Littleton* (*f*) so often

(*a*) But see Carpenter *v.* Smith, Follexf. 78. and 2. Fontblanque's Treatise of Equity, 46.

(*b*) 32. *Hen.* 8. c. 1. and 34 *Hen.* 8. c. 5.

(*c*) 27. *Hen.* 8. c. 10.

(*d*) 1. Jones, 58. Winch. 103. 116. 118.

(*e*) 7. Co.

(*f*) Litt. sect. 334.

quoted

quoted is an express authority that this is not a personal act. So that I am of opinion, that if the heir pays, the ancestor does, to all intents and purposes of this will, pay in him who is his representative.

Marsh against Marsh.

As to the second point, that the heir must take by descent, and not by purchase; I am of opinion, that he does take by descent, or in nature of descent. In *Wood's Case*, quoted 1. *Rep.* 99. *a.* it is held, that the heir shall be adjudged to take in course and nature of a descent, where neither right, title, nor action, but only a use or possibility descended, that might, upon the performance of the condition, have vested in the ancestor, and then the heir would have claimed by descent. And it is laid down as a rule in *Shelley's Case*, that where the heir takes anything that might have vested in the ancestor, there, although it first vested in the heir, and never in the ancestor, yet the heir shall be esteemed in by descent. Here is a right to the performance of this condition vested in the ancestor, a right by which the estate might possibly have vested in the ancestor, a right that might have been released by the ancestor, but not being released descends to the heir; and therefore the heir may be properly said to be in by descent, since the right to perform the condition, of which the vesting of the land is but a consequence, does descend to him. The case of the feoffment in the section of *Littleton* is parallel in all respects to the present case; parallel as to the condition, as to the performance, as to the effect of the performance, and differs only as to the person who is to take advantage of the performance of it. And this is supplied by the statute of Wills, which gives the third person as good a title to take advantage of it as the feoffor had by the common law.

*[426]

* Wilson *against* Fielding.

Case 209.

THE TESTATOR mortgaged his land for such a sum of money, and gave a bond for the performance of covenants comprised in the mortgage-deed, and died indebted to several persons by simple contract. The mortgagee got a judgment upon this bond; and the executor paid a great part of this judgment out of the personal estate, by which means the assets proved insufficient to discharge the debts by simple contract.

A bill was therefore brought by the creditors against the heir, to oblige him to refund, out of what he had been eased in respect to the land descended to him, by the discharge of a great part of the mortgage-debt out of the personal estate, as far as was necessary for the discharge of debts. And it was decreed accordingly that he should refund.

If a person, being indebted by simple contract, mortgage his land, and give a bond for performing the covenants in the mortgage deed, and die, and, on judgment obtained, the executor pays the bond, a court of equity, if there are not otherwise sufficient assets, will oblige the heir to refund the sum so paid for the benefit of all the creditors, without distinction, in proportion to their respective debts; and there [illegible] creditor, who has obtained a judgment subsequent to the testator's death, [illegible] preference to the rest of the creditors, with respect to the sum so refunded. [illegible] S. C. 2. Vern. 763. 2. Vern. 2[illegible]. 281.

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Wilson *against* Fielding.

One of the creditors by simple contract had, after the death of the testator, by suit at law against the executor, turned his simple contract debt into a judgment debt.

And THE QUESTION was, Whether the money so decreed to be refunded, and which was called equitable assets, because it could not have been assets at all without the assistance of a court of equity, should be decreed to be refunded for the benefit of all the creditors equally; or for the advantage, in the first place, of him that had turned his debt into a judgment debt? The executor and the rest of the creditors had offered this judgment creditor to be paid in equal proportion with the rest; but he refused, insisting upon his judgment.

IT WAS INSISTED, *in behalf of the rest of the creditors*, that debts by simple contract are in justice and conscience as much debts as debts by bond or judgment; that therefore, according to the rule
[427] of equity, * "that he who will have equity must do equity," if a judgment creditor stand in need of the assistance of a court of equity to make that assets which at law would not be assets, a court of equity will never give him this assistance, unless he will consent to come in equally with the rest of the creditors, who in conscience and equity have as just a demand as himself. Thus, if a man by will subject his land to the payment of debts, the court of chancery always decrees, that all the creditors, without distinguishing what the nature of the debts are, whether simple contract, bond, or judgment debts, shall be paid in equal proportion, out of the land thus subjected by will to the payment of debts.

IT WAS URGED *by the Counsel on the other side*, that nothing was more common than bills brought for the discovery of assets; that if it should happen in this case, that bonds taken in trust for the testator should be discovered, it was never yet heard of, that a creditor should be told in this court, "These bonds are assets in equity, and you shall not have the assistance of this court to make them assets in law, unless you will quit the advantage the law gives you, waive the superiority of your debt, and be content to stand upon a level with the rest of the creditors."

PARKER, *Lord Chancellor*. The doctrine that seems to be laid down by the Counsel for the creditors, that there is this standing difference between *assets in law* and *assets in equity*, that though the former shall go according to the course of administration prescribed by the law, yet the latter shall, without any regard to this, go among the creditors equally, however different the nature of their debts are, is a doctrine without any reason or foundation; and would establish a rule in equity directly contrary to the known rules of law, as to the order in which debts are to be
[428] paid (*a*). * Indeed, as to the case put of land devised by the testator to be sold for the payment of debts, it is so; and this court

(*a*) Contra 2. Vern. 62.

does

Wilson against Fielding.

does always decree the profits arising from the sale equally among all the creditors; but then this land may be considered as a gift of the testator among all his creditors; and as the testator, the donor, has not thought fit to make any distinction between his creditors, so this court, which is in nature of a trustee for the testator, will make none neither. But, generally speaking, there is no difference between *assets in law* and *assets in equity*; but both must be distributed by the executor in a course of administration. Had therefore this judgment creditor been in possession of his judgment at the time of the death of the testator, I would not have taken the benefit of his judgment from him, but would have decreed the refunding for his benefit in the first place. But this is not the case; this judgment is obtained against the executor, and whether voluntarily does not appear, and it will be impossible for me to distinguish; it is enough that it may be voluntarily confessed by the executor, who has it by this means in his power to give a preference to a simple contract creditor, at any time, before a bond creditor, and so in reality overturn the course of administration. And though this at law may be done, so that had payment been made to this judgment creditor, there had been no remedy; yet a court of equity shall never be assisting to the enabling of an executor to the doing of it.

The money was therefore DECREED to be refunded for the equal benefit of all the creditors.

HILARY

HILARY TERM,

The Fifth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Justice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Fortescue Aland, *Knt.* } *Justices.*

Nicholas Lechmere, *Esq. Attorney General.*
Sir William Thompson, *Knt. Solicitor General.*

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*[429]

Case 210.

* The King *against* Leonard.

Persons committed by *rule of court* cannot petition under the *Habeas Corpus* Act to be bailed.

THE HABEAS CORPUS ACT directs, that if a person committed for high treason or felony expressed in the warrant of his commitment, shall make his prayer and petition in open court, the first week of the Term or day of the sessions, to be brought to his trial, and shall not be indicted in the next Term or sessions after such commitment, he shall be bailed, &c.

S. C. 1. Stra. 142.

Now it was doubted, Whether persons committed by rule of Court are intitled to the benefit of this act?

And it was resolved by two Judges, *viz.* EYRE and FORTESCUE (*absente* POWYS, *dissentiente* PRATT, *Chief Justice*), that none are entitled to make their prayer but such as are committed by a warrant of a *justice of peace* or *secretary of state*, and not those committed by *rule of court*; for that is not, in the meaning of the act of parliament, a commitment by warrant (*a*).

(*a*) The defendant was committed in Trinity Vacation by a warrant from the secretary of state for high treason, and lay in prison until the last day of Michaelmas Term, when he was brought into the court of king's bench, charged with an indictment, and re-committed by rule of court. During the first week of Hilary Term, he applied to enter his prayer upon the Habeas Corpus Act: but it was refused. S. C. 1. Stra. 142.

EASTER

EASTER TERM,

The Fifth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Justice.*
Sir Lyttleton Powys, *Knt.* }
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Fortescue Aland, *Knt.* }
Nicholas Lechmere, *Esq. Attorney General.*
Sir William Thompson, *Knt. Solicitor General.*

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*[430]

* The King *against* The Parish of Burcleer. Case 211.

BY THE STATUTE of 9. & 10. *Will.* 3. c. 11. it is enacted, "That no person coming into a parish by certificate shall have a legal settlement in the parish, unless he shall *bona* " *fide* take a lease of a tenement of ten pounds a-year, or shall be " legally placed in, or execute some annual office in such parish."

A copyhold estate of 20s. *per annum* enjoyed by a *certificate-man* in right of his wife, during her life, will make a settlement, notwithstanding 9. & 10. *Will.* 3. c. 11.

It was in this case debated, Whether a certificate-man who enjoyed a copyhold of twenty shillings a-year value in right of his wife, during her life, which lasted five years after the descent of the copyhold upon her (*a*), did thereby gain a settlement, the statute

S. C. 1. Stra. 163. S. C. Sett. & Rem. 88. S. C. Shaw. P. L. 224.

(*a*) It is said, that this estate did not *descend* to the wife of the certificate-man, but was *surrendered* to her by her father, Bott's P. L. 2 vol. 685. *notis*; but even in this case, if made in consideration of natural affection, it is a *voluntary settlement*, Rex *v.* Marwood, Burr. S. C. 386. Rex *v.* Ingleton, Burr. S. C. 560.; and not a *purchase* within the 9. *Geo.* 1. c. 7. s. 7 which enacts, that no person shall gain a settlement by virtue of the purchase of any estate, unless the consideration amount is thirty pounds *bona fide* paid, &c. See Bott's P. L. 2 vol. 623.

being

THE KING *against* THE PARISH OF BERCLEER.

being express, that a certificate-man shall not gain a settlement unless by two ways, of which this is none.

THE COURT resolved, that this is a settlement. For by the preamble of this act it is plain, that the meaning of it was to hinder and debar certificate-men from gaining settlements by some act pursuant and consequential of the certificate; as that the certificate * should not amount to a notice in writing, and so fall within the statute of 1. *Jac.* 2. c. 17, &c. This construction was parallel to that which had been made upon the statute of 13. & 14. *Car.* 2. c. 12. which enacts, "That any poor person coming to "settle on a tenement under ten pounds, is removable by two "justices within forty days after his coming;" and yet it is resolved, that a person coming to reside upon his own estate, though under ten pounds, is not within the statute, nor removable within the forty days; for that neither this, nor any other act of parliament, designed to debar a man from coming to look after and improve his own estate; and whenever a person comes to his own estate, that such a person is unremovable, *i. e.* settled (*a*).

* [431]

(*a*) The law of this case is confirmed, Rex v. Stansfield, Burr. S. C. 205.; Rex v. Cold Ashton, Burr. S. C. 444; Rex v. Shenston, Burr. S. C. 468.; Rex v. Wooburn, Burr. S. C. 785.; and see Mr. Const's edition of Bott's Poor Laws, vol. 2. page 681 to 697. where all the cases on this subject are collected.

Case 212. Atkin *against* Berwick.

Bankruptcy. Whether goods delivered antecedent to an act of bankruptcy, but accepted subsequent, were bound by the bankruptcy.

S. C. Fort. 353. S. C. 1. Stra. 165.

A AND *B.* lived in two very remote parts of the kingdom, and had dealings one with another in the way of trade. *A.* sent up to *B.* a quantity of goods. *B.* apprehensive that he should soon become a bankrupt, and not thinking it reasonable that these goods should go to the payment of other creditors, delivered a quantity of goods, being the greatest part of them the very individual goods that he had before received of *A.* into the hands of *C.* for the use of *A.* *B.* subsequent to the delivery, and precedent to the acceptance of them by *A.* became a bankrupt.

The question was, Whether these goods were not so absolutely vested in *A.* and become his property, by the delivery of them to *C.* for his use, as not to be subject to the disposal of the commissioners of bankruptcy?

And upon this appearing by evidence at the trial to be the case, it was stated, by the direction of PARKER, *Chief Justice*, who tried the cause, for the opinion of the Court:

Who all delivered their opinion *seriatim* this Term, That the property of the goods was so vested in *A.* by the delivery of the goods

goods to *C.* for the use of *A.* that they were not subject to the disposal of the commissioners of bankruptcy (*a*). ATKIN *against* BERWICK.

PRATT, *Chief Justice*, grounded himself pretty much upon the authority of the case of *Butler v. Baker* (*b*).

FORTESCUE, *Justice*, mentioned the argument of *Mr. Justice Ventris*, in the case of *Thompson v. Leach* (*c*) (upon the * reasons of which the judgment in the house of lords was given) as a storehouse of law proper to this head (*d*). * [433]

Cases quoted in the argument were, 2. *Cro.* 680. 687. 1. *Bulstrode*, 68. 3. *Cro.* 26. *b. Rolle's Abr.* 32. *pl.* 13. *Yelverton*, 164. *Cro. Jac.* 667. *Dyer*, 49. 2. *Rolle's Rep.* 39. 2. *Leon. fol.* 30. *Clerk's Case.*

Judgment for the defendant.

(*a*) Lord Mansfield, in the case of Harman *v.* Fisher, approves of the determination in this case; but says, the true reason of it was, that *B.* refused to accept of the goods which *A.* had sent, and returned them to *C.* on *A.*'s account, Cowp. 117.; for it was a renunciation of the contract by all the parties concerned; and a contract may be rescinded by the vendor and vendee before the rights of other persons are concerned, Smith *v.* Field, 5. Term Rep. 404.; and therefore if an agent buy goods, and deliver them to the vendee's packer, after the vendee has written him a letter to countermand the purchase but before such letter is received, these goods shall revest in the vendor, so far as to prevent their being attached in the packer's hands by the creditors of the vendee, Salte *v.* Field, 5. Term Rep. 211. But if, in such case, the vendor attaches the goods in the hands of the packer, as the property of the vendee, he thereby elects not to rescind the contract, and cannot, on the vendee's becoming bankrupt, recover them from the packer in an action of trover, Smith *v.* Field, 5. Term Rep. 402. So a delivery of goods to a *bona fide* creditor, where it is not a voluntary act on the part of a trader, is valid, Yates *v.* Groves, 1. F. Vez. Rep. 280. Thompson *v.* Freeman, 1. Term Rep. 155. But the delivery of a trader's property by *deed* is an act of bankruptcy, 1. Burr. 467. 2. Burr. 827. 1. Bro. C. C. 199. Dougl. 86. Cowp. 117. 629.

(*b*) 3. Co. 25.

*(*c*) Carth. 211. 250. 435. Comb. 438. 468. Comy. 45. 1. Eq. Abr. 278. Holt, 357. 623. 665. 3. Lev. 284. 3. Mod. 296. 301. 12. Mod. 173. 1. Ld. Ray. 313. 2. Salk. 427. 565. 618. 675. 3. Salk. 300. 1. Show. 296. Show. P. C. 150. 2. Vent. 198.

(*d*) See 1 Stra. 167.

EASTER TERM,

The Fifth of George the First,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joseph Jekyll, *Knt. Master of the Rolls.*

Anonymous. Case 213.

A DEFENDANT refused to answer, and stood out all contempts, until an order was made for a sequestration. Motion to have a bill taken *pro confesso.*

IT WAS PRAYED, *by the plaintiff's Counsel*, that the bill might be taken *pro confesso.*

THE COUNSEL *on the other side* objected, that this could not be done; because the sequestration was neither under seal, nor executed; and also because the plaintiff did not produce the original itself, but only a copy of it.

PARKER, *Lord Chancellor.* The last objection is certainly a good one. But as for the other, there seems to me to be no reason for it; for the putting the seal to the sequestration, and actually executing it, seems to be then only necessary, when the plaintiff is not ripe for a decree upon his own bill, but wants some discovery from the defendant's answer upon which the decree may be founded: and therefore the actual executing of a * sequestration, to extort an answer of which the plaintiff has no occasion, seems to me very unnecessary. [432]

Butler *against* Duncomb. Case 214.

LAND is by marriage-articles settled upon husband and wife, for term of their lives, and after the death of the longest liver of them, then to trustees for the term of five hundred years; Land settled upon husband and wife for their lives, and the longest liver of them, then to trustees for a term of years, which term was in trust for raising, after the commencement of a term, a portion of 1000l. payable at twenty-one, or marriage; husband dies, leaving issue a daughter, who marries, living the mother. Decreed, that the portion should not be raised by sale or mortgage of the term, living the mother, by reason of those words " after the commencement, &c."—S. C. 1. Eq. Abr. 339. S. C. 2. Vern. 760. S. C. 1. Peer. Wms. 448.

which

BUTLER against DUNCOMB.

which term is declared to be in trust for the raising, after the commencement of the term, a portion of three thousand pounds for daughters, payable at the age of twenty-one, or marriage, which should first happen; remainder to issue in tail-male, &c.; husband dies, leaving issue a daughter, and no son; the daughter married during the life of the mother.

The daughter and her husband bring their bill to have the portion raised immediately by sale or mortgage of the term, during the life of the mother.

It was insisted upon, that cases had very frequently happened in this court where, in favour of provision for children, terms had been sold in the life of the parents, by the decree of this court; which seems the more reasonable here, because it is made expressly payable at the age of twenty-one or day of marriage, which should first happen; which words seem to be useless, as the case has now fallen out, the daughter marrying before the death of the mother, unless the portion might be raised by sale or mortgage of the future term.

* [434] * PARKER, *Lord Chancellor*, decreed, upon great deliberation of the case, that the daughter, when married, had a present right or interest vested in her that should descend to her executors or administrators; but that it was a right to a portion to be raised after the commencement of a term that could not take place until after the death of the mother.

The reasons of his resolution were, that he did not much approve of selling of future terms, during the life of both or either of the parents; and was it *res integra* (*a*), he should with great difficulty admit of it. He looked upon the care taken in many settlements of late to prevent this as so many protestations against the reasonableness of this sort of decrees. As for the cases of this nature, he said, there were several upon which, if he had time, he could raise observations pertinent to the present question (*b*): but he would only say this in general, that there was not one of them that came up to this present case, which is to have a portion raised *before the commencement of a term*, when the settlement is express that it is to be raised *after the commencement of the term*. In marriage-settlements, it is not only to be considered what is to be wished, but what the estate will bear. That the words "to be "raised after the commencement of the term" did import as strongly the negative that it was not to be raised before, as the raising three thousand pounds imports that no more shall be raised.

(*a*) See Gerrard *v.* Gerrard, 2. Vern. 458. Greaves *v.* Maddison, T. Jones, 201.; and Wingrave *v.* Palgrave, 1. Peer. Wms. 401.

(*b*) Sandbys *v.* Sandbys, 1. Peer. Wms. 707. Rearsly *v.* Newland, 2. Peer Wms. 93. Ravenhil *v.* Dansey, 2. Peer. Wms. 179. Brome *v.* Berkley, 2. Peer. Wms. 484. Hebblethwaite *v.* Cartwright, C. T. T. 31. Stanley *v.* Stanley, 1. Atk. 549. Hall *v.* Carter, 2. Atk. 354. Stevens *v.* Dethic, 3. Atk. 39. Lyon *v.* Chandois, 3. Atk. 416. Church *v.* Harvey, Amb. 335. Smith *v.* Evans, Amb. 633. Conway *v.* Conway, 3. Brown C. C. 267.

According

According to this construction, all the words of the settlement are satisfied: even the words "payable at the age of twenty-one or "day of marriage, &c." are not useless, even as this case has happened; for they serve to give the daughter a present right and interest (which is descendible) to a portion, to be raised indeed hereafter. * As to the time of the commencement of the term; that is so plainly fixed to the death of the mother, as that it will admit of no proof, for want of a clearer medium to prove it by. And though a term may possibly, in some particular cases, begin in equity before it does in law, yet certainly it cannot here, where the mother is entitled to the perception of the profits, until the commencement of the term.

BUTLER against DUNCOMB.

* [435]

But THE CHANCELLOR would not give the defendant costs, because the matter was somewhat doubtful (a).

(a) It appears from the Register's book, that afterwards, on the wife and the trustees consenting in court, the husband was allowed to raise fifteen hundred pounds, which was a moiety of the portion, by mortgaging the reversionary term to supply his occasions in trade, S. C. 1. Peer. Wms. [illegible]

TRINITY TERM,

The Fifth of George the First,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joseph Jekyll, *Knt. Master of the Rolls.*

* [436]

* Trevor *against* Trevor.

Case 215.

Trust.
Marriage settlement.
S. C. 1. Eq. Abr. 387.
S. C. 9. Mod. 161.
S. C. 1. Peer Wms. 622.
S. C. 2. Eq. Abr. 475. 505.
S. C. 2. Bro. P. C. 122.

SIR JOHN TREVOR did by marriage articles oblige himself, within two years after his marriage, to settle such and such lands to the use of himself for life, then to the use of his wife for life, and then to the use of the heirs males of that marriage, and the heirs males of such heirs males. It was also covenanted by the articles, that he should stand seised of these lands, to the uses aforesaid, and such other uses as should be declared by the trustees therein named, until such settlement should be made. *Sir John Trevor* had issue several sons by that marriage. He levies a fine of these lands, but does not declare to what uses the fine should be levied; but several years after, he by deed declares the uses of the aforesaid fine in favour of his second son, and dies, without ever making any settlement pursuant to the articles, and left a very considerable estate to descend upon the eldest son, not mentioned in the articles.

* A bill is brought by the eldest son to have the fine set aside, and the lands comprised in the articles, conveyed as therein mentioned. * [437]

IT WAS INSISTED *in favour of the defendant*, the second son,

FIRST, That in case a settlement had been literally made according to the articles, then by operation of law, according to *Shelley's Case*, an estate-tail would have been vested in *Sir John Trevor*; and consequently he would have been able to have done what he has now done, *viz.* levied a fine and barred the issue.

A a 4 SECONDLY,

Trevor *against* Trevor.

SECONDLY, It was urged, that the covenant to stand seised, &c. was in law a conveyance executed, and did actually vest an estate-tail in *Sir John Trevor*; and consequently the fine was well levied.

THIRDLY, It was urged, that if in respect to those lands agreed by the articles to be settled, the eldest son had any injustice done him, so as to entitle him to relief in a court of equity, his father had made him an abundant satisfaction or compensation for it, by permitting an estate not affected by the articles, and of greater value, to descend upon him, when he might have given it from him.

PARKER, *Lord Chancellor*, decreed in favour of the eldest son (*a*): He said, that this case was in effect no more than what was very common in chancery, to decree such a conveyance, as was, though not according to the words of the articles, yet according to the intention of them, by taking care that the husband should be made only tenant for life, and so not have it in his power to defeat the intention of the settlement. That the articles were but minutes of the settlement; and therefore not necessary to be verbally pursued. That what the Court, if applied to, would have decreed, they would so far consider performed, as to set aside the fine.

[438] * As to THE SECOND POINT, he looked upon the covenant to stand seised, as what was designed to supply any defect in the conveyance, and not as an execution of the articles.

As to THE THIRD POINT; there might have been something more to have been said for it, if the articles had been to settle land generally, and not such and such lands in particular, naming them.

This decree was affirmed in the house of lords (*b*).

(*a*) See Jones *v.* Laughton, 1. Eq. Cases Abr. 392. Nandich *v.* Wilkes, 1. Eq. Cases Abr. 393. Cusick *v.* Cusack, 1 Brown P. C. 470. West *v.* Erissey, 2 Peer Wms. 349.

(*b*) See 9. Mod 151. and 2. Brown's Parl. Cases, 112.

Case 216. **Hancock *against* Hancock.**

Bond fraudulently obtained

S. C. 2. Eq Abr. 219.

HANCOCK had issue two sons; the one married a daughter of *Dolswell*; the other, being the youngest, having made his addresses to a lady, and all things being adjusted and concluded upon for the wedding, *Dolswell* took the young gentleman aside, shewed him a bond ready drawn, which as he said was prepared by the direction of his father, and told him, that unless he would execute it, his father would not suffer the match to proceed; and moreover, that he must not so much as mention anything relating to this bond, as he valued his father's displeasure.

The

The condition of this bond was, that if he should die without Issue by that marriage, he would leave three thousand pounds to one or more of the children of the elder brother, who had married this daughter of *Dolswell*. HANCOCK against HANCOCK.

The young gentleman under this terror executes the bond.

Afterwards he spoke to his father of it, who denied that he ever gave such directions, and gave him* three thousand pounds to indemnify him against the bond, which three thousand pounds was, when this bond should be delivered up to him, to be distributed among the grandchildren. The father dies; the second son in his life-time, and by his will, gave * in land and money more than three thousand pounds to one of the children of his elder brother, and dies without issue. The only evidence of the manner by which this bond was extorted, was a recital in the will of the second son. It was proved in the cause, that when the younger brother was making these gifts in favour of his elder brother's son, he was advised to declare, that this was in satisfaction of the bond; but his answer was, that this would look like complying with a bond which he had all along declared had been unjustly extorted from him. [439]

This bond was of fifty years standing.

PARKER, *Lord Chancellor*. I make no doubt but this bond was fraudulently extorted; but I know not how to come at it; for to allow a recital in the will of the obligor, as evidence to overthrow a bond, may be a thing of dangerous consequence. However I think the bond has been satisfied; and the reason given why he would not declare it to be in satisfaction, does very plainly amount to a declaration of his intention, that he did not design to make the gifts he did, over and above the satisfying his bond.

TRINITY TERM,

The Fifth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Justice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Justices.*
Sir John Fortescue Aland, *Knt.*
Nicholas Lechmere, *Esq. Attorney General.*
Sir William Thompson, *Knt. Solicitor General,*

Asgill *against* Hunt. Case 217.

PROCESS in SPIRITUAL COURT for calling a woman "*whore*" in *London*. After sentence, the court of king's bench was moved for a prohibition.

A prohibition lies to an inferior court, *after sentence* given, where it appears upon the face of the proceedings that the matter was not within the jurisdiction of the court.

But the prohibition was refused.

THE COURT said, that it was a known rule laid down in books, that where it appears upon the face of the libel, that the matter is of temporal and not spiritual cognizance, there a prohibition may be granted after sentence; but not where it does not appear; for there it must be taken advantage of before sentence (*a*). Now here the offence in the libel is certainly a matter of spiritual cognizance; and though it appears in the libel, that * the words were spoken in *London*, yet that would not take away the jurisdiction of the spiritual court, were it not for a particular custom, by virtue of which those words are punishable in *London*: but this being a particular

S.C. 1. Stra. 187. S. C. Fort. 347.

* [440]

3. Atk. 52. 4. Viner, 11, 6. Com. Dig. 108. Bunb. 81.

(*a*) See Banister *v.* Hopton, Ante, 12. Symes *v.* Symes, 2. Burr. 813. Paxton *v.* Knight, 1. Burr. 314. Rex *v.* Rector of Bosworth, 1. Ld. Ray. 435. Full *v.* Hutchins, Cowp. 424. Darley *v.* Cosens, 1. Term Rep. 552. Blacquiere *v.* Hawkins, Dougl. 377. Ladbroke *v.* Crickett, 2. Term Rep. 649.

ABGILL *against* HUNT.

particular custom, the Court can no more judicially take notice of it, than they can of any other custom of the city of *London (a)*; and if a cause be removed out of the City courts by *habeas corpus*, the custom must be returned, or no *procedendo* can ever be granted.

(*a*) The book of the town-clerk of *London* contains no account of any custom to cart whores in the city of *London*, and it is said that this custom has never been proved in such a manner as to maintain an action in *Westminster-Hall*. Stanton *v.* Jones, Dougl. 382. *notis.*

Case 218.

Dr. Bows *against* Jurat.

A prohibition lies to the spiritual court to stay a suit for *Easter offerings*, on a suggestion of a custom to pay them, although sentence was given against the defendant by default.

Moor, 916.
1. Roll. Rep. 259.
Carth. 33.
Cro. Jac. 670.
6. Com. Dig. 110.

DR. BOWS, vicar of *New Romney*, brought a libel in the spiritual court against the defendant, one of his parishioners, for *Easter offerings*; suggesting that they had, time out of mind, used to be paid in that parish.

The defendant made no defence at all in the spiritual court; but after sentence against him, moves the court of king's bench for a prohibition.

The motion was granted *nisi*.

The reason why the Court doubted, whether the prohibition was to be granted or not, was their ignorance of the practice of the spiritual court. For the Court seemed clearly of opinion, that if the practice of the spiritual court was agreeable to that of the courts at law, *viz.* to take every thing *pro confesso* against a defendant that makes no defence, and so give sentence for the plaintiff without obliging him to prove the truth of his case, then the prohibition was not to be granted; because the custom set forth by the plaintiff was not denied by the defendant, and consequently no occasion for trial of the custom. But in case the practice of the spiritual court was, not to give sentence for the plaintiff, even in case of no defence made by a defendant, without proof made to the [441] Court by the plaintiff of the truth of his case, that * then a prohibition was to be granted; because then the sentence of the spiritual court was founded plainly upon proof made before them of a custom, which is not to be permitted, because the proof required by them is very different from that required by the common law.

DR. PINFOLD, who spoke against the prohibition, ingenuously owned, that it was the practice of the spiritual court to require proof.

However, THE COURT took time to consider, and would not make the rule absolute.

TRINITY TERM,

The Fifth of George the First,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joseph Jekyll, *Knt. Master of the Rolls.*

Upwell *against* Halsey.

Case 219.

If a testator devise all his personal estate to his wife, and that such part thereof as she shall leave of her subsistence shall return to his sister, the sister shall have the residue after the death of the wife.

S. C. 1. Peer. Wms. 651.
S. C. 2. Eq. Abr. 325. 347.

THE clause of the will upon which this case turned, was this: "I make my wife whole and sole executrix of all my personal estate; and my will is, that such part of my personal estate as she shall leave of her subsistence, shall return to my sister." The interest of the personal estate was not sufficient to maintain the wife. The wife after marries.

The dispute was between the second husband of the wife, and the sister of the first husband.

Sir Joseph Jekyll, *Master of the Rolls*, before whom the cause was heard, gave it in favour of the sister. He said, that such a sense, if possible, ought to be put upon a will, as is agreeable to the intention of the party, and consistent with the rules of law. And such a one he thought this will was capable of; for he understood it thus: "I devise the use of my personal estate to my wife for her life, with a power" (the interest not being sufficient for her maintenance) "to dispose of as much of the principal as shall be necessary for her subsistence;" and his sister to have the residue. He thought no stress was to be laid upon those words, "all my personal estate;" for that is no more than what the law implies; for when a person is made executor, * the law vests all the personal estate in him. [442] But then it is true, that this gift, which by construction of law is absolute, may be qualified by the declared intention of the testator. Here it is restrained to her for her life; but with a power, indeed, to dispose of so much of the principal,

USHELL against HALSEY.

principal, as shall be necessary to her subsistence, over and above the interest.

An account was accordingly decreed to be taken, with directions suited to this construction of the will (a).

(a) See Astley v. Powis, 1. Vezey, 499. Beckham v. Cross, 2 Vezey, 471. Neal v. Attorney General, Mosely, 246. Bacon v. Clerk, 1. Peer Wms. 478. Kelly v. Bellew, 1. Bro. P. C. 202.

Case 220.

Farrington *against* Knightly.

If a testator make two executors and give them fifty pound a piece, and bequeath other legacies to his relations, the executors shall be trustees of the residue for the next of kin.

S. C. Prec. Ch. 566.
S. C. 1 Peer Wms. 544
S. C. 2. Eq Abr. 421. 424. 440.
2 Vern 99.
2. Atk. 18.
2 Bro. C C. 634
3 Bro C.C 28.
1 Peer Wms. 7

THE TESTATOR made two executors to his will, and gave each of them a legacy of fifty pounds a-piece. He gave legacies likewise to all, or most of his relations; and then there being a surplus of the estate, to the amount of about twelve hundred pounds, unexhausted by debts and legacies,

The question was, How this surplus should go, whether according to the statute of Distributions, or to the executors?

PARKER, *Lord Chancellor*. There are several ancient laws, by which the estate of an intestate was made distributable, in a manner, as it is now by the statute of 22. & 23. *Car.* 2. c. 10. So that law is in reality but declaratory of what the old law was; and yet, which is very strange, before that statute, the temporal courts were used to prohibit the spiritual court, when they went about to compel the party to make a distribution, in conformity to those laws. As to the present case; it is more material, it may be, that the law should be settled and known, than which way it is settled. The very examination of witnesses in the case *Littlebury v. Buckley (a)*, is a plain proof that the law is in this point very unsettled. * It may, perhaps, be of mischievous consequence to overthrow the authority of the case of *Foster v. Mount (b)*, and the subsequent resolutions founded upon the authority of that. Though it is highly probable, that if in the case of *Foster v. Mount*, the surplus had been less considerable, the resolution would have been otherwise; but the executor being an attorney, and a stranger to the testator, and the surplus very considerable, it seemed to be a very gross absurdity to suppose, that the testator could ever intend to give away so very considerable a surplus, from his relations, to such an executor. He further observed, that this will carried with it the suspicion of being unfinished and incomplete, for want of the usual conclusion, "in witness whereof "I have put my hand and seal;" a very strong circumstance to induce a belief, that this surplus was never designed for the executors.

* [443]

He took further time to consider of his decree (c).

(a) 2. Vern. 674.
(b) 1. Vern. 73
(c) The Lord Chancellor afterwards delivered his opinion, that the executors having an express legacy of fifty pounds each, should be trustees of the surplus of the personal estate for the next of kin, according to the statute of Distributions. See S. C 1. Peer Wms. 550. Mr. Cox's note at the end of the case; Petit v. Smith, 1. Peer Wms. 7. and Carey v. Gooding, 3. Brown, C. C. 110.

MICHAELMAS

MICHAELMAS TERM,

The Sixth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Justice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Fortescue Aland, *Knt.* } *Justices.*

Nicholas Lechmere, *Esq. Attorney General.*

Sir William Thompson, *Knt. Solicitor General.*

NOTE. PRATT, *Chief Justice*, was absent all this Term, being ill of an ague and fever.

Anonymous. Case 221.

A *scire facias* on a recognizance in an action of debt, assigning the breach in the words of the condition, "that "he should render himself in "execution of "the judg"ment," is good.

SCIRE FACIAS in the court of common pleas upon a recognizance taken in an action of debt; judgment for the plaintiff, and error brought.

IT WAS INSISTED *for the plaintiff in error*, that the breach was not well assigned; for though it be a general rule, that a breach assigned in the very words of the condition, is a good assignment; yet that rule does not hold, where the words are by law interpreted contrary to their natural signification, which is the case here. For the words of the condition are, "that he should ren"der himself in execution of the judgment;" which words, in their natural sense, import an act that it is impossible for the bail to do, for it is the principal only that can render himself in execution of the judgment; so that the meaning of the words in this case must be, to render himself in order to execution. [444] And therefore the pleading should not have been in the very words of the condition, but in such words as are expressive of that sense,

ANONYMOUS. ſenſe, that the words of the condition are, by operation of law, to be underſtood in. If there are two joint-tenants, and the one by deed grant all his eſtate to his companion, this will in operation of law be underſtood and expounded as a releaſe, that being the proper conveyance in law from one joint-tenant to another. But if the party had in this caſe pleaded *quod conceſſit*, it had been naught; for though in a deed, rather than it ſhould be void, it ſhall be expounded a releaſe, it is not ſo in pleading, where words muſt be always underſtood in a ſtrict and proper ſenſe. 2. *Saunders*, 97.

This objection was over-ruled by THE COURT, who were all of opinion, that the words in the pleading muſt be underſtood in the ſame ſenſe, as when uſed in the condition of the recognizance.

Advantage cannot be taken of variance between *ſcire facias* and *recognizance*, after omitting *oyer* in the court below.

THEN IT WAS URGED *for the plaintiff in error*, that there were variances between the *ſcire facias* and the recognizance.

THE COUNSEL *for the defendant* acknowledged that there were variances, and material ones; but inſiſted, that the plaintiff could not now take advantage of them; becauſe he had not, by demanding *oyer* of the recognizance in the court below, made it part of the record, and ſo brought it before this Court; and that as it ſtands now, the recognizance is no part of the record. *Salkeld*, 282. 264. 1. *Rolle's Abr.* 760. *pl.* 1, 2.

And THE COURT being of this opinion, they gave judgment *niſi* for the defendant in error.

MICHAELMAS

MICHAELMAS TERM,

The Sixth of George the Firſt,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

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*[445]

* Turton *againſt* Benſon.

Caſe 222.

MRS. TURTON, a widow, being poſſeſſed of an eſtate in land, as her jointure, to the value of four hundred pounds a-year, and having a ſon at the age of twenty-two years, and a barriſter at law, entered into a treaty of marriage for her ſon with *Mr. Benſon.* The agreement was, that *Mr. Benſon* ſhould give with his daughter a portion of three thouſand pounds, and in conſideration of this fortune, *Mrs. Turton* agreed to ſettle immediately the four hundred pounds a-year, which ſhe had an intereſt in for her life, as her jointure, upon her ſon; and three hundred pounds a-year of this very land, was to be ſettled upon *Mr. Benſon's* daughter, as a jointure proportionable to her fortune. When all things were thus agreed upon, and the affections of the young people engaged, *Benſon,* the father of the young lady, takes *Turton* the ſon aſide, and tells him, that his circumſtances would not allow him to give three thouſand pounds with his daughter; however he would do his utmoſt, *viz.* give him two thouſand pounds, and let him have the other thouſand pounds without intereſt for ſeven years; but that he muſt give a bond for the re-payment of this thouſand pounds at the end * of ſeven years; and that unleſs he complied with this, the match ſhould not go on. *Turton,* rather than the match ſhould be broken off, gives the bond. Afterwards a ſettlement, to which *Mrs. Turton,* the mother, was one of the parties, was prepared and executed, in purſuance of the agreement, and expreſsly mentioned to be made in conſideration of a portion of three thouſand pounds, and *Mrs. Turton* actually quitted to her ſon, the intereſt ſhe had for her life,

If by marriage ſettlement, it is agreed to give a man 3000l. as a portion with his wife, in conſideration of a jointure to be made on her, and he, without the conſent of his mother who treated for the marriage, privately give a bond to the wife's father to re-pay 1000l. of the portion in ſeven years, this bond is void in equity, and cannot, on the [illegible] becoming a bankrupt, be aſſigned to his creditors.

*[446]

S. C. 1. Eq. Abr. 45. 88.
S. C. 2. Vern. 764.

S. C. Prec. Ch. 522. S. C. 1. Stra. 240. S. C. 1. Peer Wms 496.

TURTON *against* BENSON.

knowing nothing of this bond; and the marriage took effect. *Mr. Benson* owed *Sir Theodore Jansen* a considerable sum, for which he and his son were both bound; but *Sir Theodore*, not satisfied with this, procured from *Mr. Benson*, the father, an assignment of this bond thus procured from *Turton* the son-in-law, as a collateral security for his debt. *Benson* the father, four years after the marriage, dies, very considerably indebted to *Sir Theodore*, *Mrs. Richardson*, and others, both by bond and simple contract. Assets were left sufficient to pay the bond debts; but not the debts by simple contract. *Mrs. Benson*, the widow, takes out administration. The debt to *Sir Theodore* was immediately discharged; the son being bound for it as well as the father. Afterwards the administratrix and the son enter into a deed of composition with *Mrs. Richardson*, and the major part of the creditors. By this deed of composition it was agreed, that the administratrix should pay small debts of a trifling nature, as servants wages, &c. to the value of about two hundred pounds; that an office the father had purchased for the son should be sold, and the profits arising from the sale should be assets; that all the creditors, parties to this deed, should be paid in equal proportion out of the assets, without regard to the nature of their debts, whether bond or simple contract. That the administratrix should do her endeavour to get in all the debts
* [447] standing out; and that the * administratrix should not be sued or molested by any of the creditors, parties to this agreement, Whatever should be hereafter got in or recovered of the debts standing out, was to be equally divided among the creditors. It was proved in the cause, that *Mrs. Richardson*, hearing that this bond was to be assigned to her, went to *Mr. Turton* to talk with him about it; and that *Mr. Turton* told her, that if he had to do with the family of the *Bensons*, he would never pay the bond, for he had, he was sure, law of his side; but if it was to be assigned to her, he would not dispute it. This discourse was about six weeks before the deed of composition; but was positively denied by *Turton* in his answer.

THE QUESTION was, Whether *Turton*, the seven years being expired, should be obliged to pay this thousand pounds, for which the bond was given, to the creditors of *Mr. Benson*?

There were several authorities produced to shew, that bonds of this nature had been relieved against in equity. The case of *Kemp v. Coleman (a)*, laid down as a rule in equity, that where the son, without the privity of father or parent, during the treaty of the match, gives a bond to return, or refund any part of the portion, such bond is void. In the case of *Lord Hamilton v. Lord Mohun (b)*, one of the covenants was, that the intended husband should, within two days after the marriage, release to the guardian of the young lady, all accounts of the mesne profits of an estate belonging to her; and COWPER, *Lord Chancellor*, held this co-

(a) 1. Salk. 156. (b) 1. Salk. 158.

venant

venant void, admitting it obtained neither by surprize nor fraud, because it was for the private benefit of the guardian; and compared this sort of contracts to brokage bonds, but thought them * of a more mischievous consequence; and the rule mentioned in the former case was again laid down. In the case of *Goldsmith v. Bunning (a)*, a note for payment of so much money was given to a maid-servant, in consideration of the endeavours she was to use for the procuring such a match; the maid-servant marries one that knew nothing of the consideration of the note, but was induced to have her upon account of the money he thought her entitled to by the note; so that he might be looked upon as a purchaser of this note for a valuable consideration, without notice of the reason for which this note was given; and yet the note was set aside. In *Lamlee v. Hayman (b)*, a mother agreed to part with her jointure, for the advancement of her son in marriage; but took a private security from her son, to assign over to her, immediately after the marriage, a leasehold estate, that the son was entitled to, and possessed of as his own. This agreement was set aside in equity. In the case of *Peyton v. Blaidwell (c)*, *Blaidwell*, upon the marriage of his kinsman, agreed to settle upon him such an estate in possession, and such in reversion; but entered into a private agreement with the kinsman, that after the marriage took effect, he should re-demise, &c.: this agreement was set aside in equity, and *Blaidwell* forced to account for the mesne profits of what was thus re-demised, in pursuance of the private agreement. In the case of *Sloan v. Fowler (d)*, *Fowler*, the father, told his son he would not give his consent to his marriage with *Sloan's* daughter, except he would enter into bond to pay him such a sum of money, as he said he wanted for a provision for his younger children; upon which the son, rather than the match should go off, gave his father his bond for the sum required; and this bond the son was relieved against, upon a bill brought by himself and his father-in-law. * [448]

* THE COUNSEL *for the creditors* insisted much upon the age and profession of *Turton*, the one twenty-two years, the other a barrister at law; but they seemed to own, that with respect to the administratrix of *Mr. Benson*, they should have had a hard case of it; but that now it being against creditors, that would distinguish this case from the rest of the cases cited. They insisted upon the assignment of this bond to *Sir Theodore*; upon the acquiescence of *Turton*, during the life of *Mr. Benson*, which was four years after the match; and upon the discourse that passed between *Turton* and *Richardson*, which was an inducement to her to come into this composition. The case of *Ellis v. Warner (e)* was cited, where an usurious contract was held good, in favour of an innocent person. * [449]

(a) S. C. 1. Eq. Abr. 89.
(b) 2 Vern. 466. 499.
(c) May, 1654. 2. Vern. 500.
(d)
(e) Cro. Jac. 32. S. C. Moor, 752. S. C. 1. Brownl. 85. S. C. Yelv. 47.

TURTON *against* BENSON.

2. Vern. 564, 565, 566.

THE COUNSEL for *Turton*, in their reply, quoted the case of *Taylor v. Wheeler (a)* to shew that an assignee could not be in a better condition than the bankrupt; from whence it was inferred by parity of reason, that the creditors in the present case could not be in a better condition than *Mr. Benson*, or his administratrix.

PARKER, *Lord Chancellor.* All agreements of this nature are odious, and have as constantly been set aside by this Court, as they have been brought before it, even in favour of those very persons that were parties to the agreement (*b*). In this case there are plainly two agreements; the one open and above-board, the other secret and private, and derogatory of the former. By the first the fortune is three thousand pounds, by the latter it is reduced to two; and this plainly to the deceit of the mother, a party to the settlement, who, upon consideration of this fortune, * [450] actually quitted her jointure, in order to make this settlement. And if this bond be naught as to *Benson*, no assignment of his can make it good; for if it should, there is an end at once of the jurisdiction of this Court over frauds; for then no matter how vicious and fraudulent the agreement be; make but an assignment, and that will cure all (*c*). When bonds are assigned, the meaning is, that the assignee is to have all equitable advantages that the assignor could have had. Suppose a bond is assigned, upon which both principal and interest are discharged, shall the assignee recover the penalty, which the obligee had no right to (*d*)? I do not say this bond is so void, as that no subsequent agreement, upon good consideration, could make it valid. But nothing like this is in the present case. As for *Sir Theodore* and the assignment to him; his debt being paid, he is entirely out of the case. As to the *deed of composition*, as it is called, between the administratrix and the creditors; there is nothing in it to influence this case, nor can there in the nature of it be found so much as one reason, drawn from this bond, to induce them to enter into it. It is only an agreement made between the creditors, for preventing the wasting of the assets [illegible] law expences, and restraining the administratrix from giving [illegible] preference to debts, that by law she might. As for *Turton's* promise to *Mrs. Richardson*, if true (for it is positively denied by [illegible]), how far in honour it may bind him is nothing to me. [illegible] a promise made upon supposition of an assignment that was never made; nor can she be supposed to become a party to this agreement upon account of this promise. The making of the [illegible] arising from the sale of the office is assets; the preference

(*a*) [illegible] Salk. 499.

(*b*) [illegible] v. Bladwell, 1. Vern. 240. [illegible] v. Redman, 1. Vern. 348. [illegible] v. [illegible], 1. Vern. 475. Lambly v. [illegible], 2. Vern. 499. Keat v. [illegible], 2 Vern. 558. Pitcairne v. [illegible], 2. Vezey, 375. Neville v. [illegible], 1. Brown's C.C. 543. Roberts v. Roberts, 3. Peer Wms. 66. Arundel v. Trevillian, 1. Ch Rep. 47. Smith v. [illegible]kwell, 3. Atk. 566. Jackson v. Duchaire, 3. Term Rep. 551.

(*c*) See 2 Vern. 692.

(*d*) See Hill v. Calloval, 1. Vezey, 122.

the

the adminiſtratrix might have given to other debts, had ſhe refuſed, are plain and * good reaſons for her to come into it. Creditors are, it is true, intitled to favour; but this is only with reſpect to the eſtate of the debtor (*a*). TURTON *againſt* BENSON. * [451]

(*a*) This caſe was originally heard at the Rolls, in Michaelmas Term 1718, and the Maſter of the Rolls decreed that the plaintiff ſhould be relieved and the bond delivered up, S. C. 2. Vern. 764. Gilb. Chan. 288. from this decree the preſent caſe was an appeal, on which the former decree was affirmed, S. C. 1. Peer Wms. 498.—See Webber *v.* Farrer, 2. Brown P. C. 88. Hamilton *v.* Mahon, 1. Peer Wms. 118. Montefiori *v.* Montefiori, 1. Black. Rep. 363. Morriſon *v.* Arburthnot, 1 Brown's C. C. 548. Jackman *v.* Duchaire, 3. Term Rep. 551.

Blunden *againſt* Barker.

Caſe 223.

Of the cuſtom of *London* with reſpect to the eſtates of freemen.

S. C. 2. Eq. Abr 258 268. S. C. 1. Peer Wms. 633.

THE BILL was brought by *Mr. Blunden* in right of his wife, who was the daughter of *Ibbot* the teſtator, and by the widow of the ſaid teſtator, againſt *Mrs. Barker*, who was the other daughter of *Ibbot*, and adminiſtratrix with the will annexed, to have a diſcovery of the eſtate of the deceaſed *Mr. Ibbot*, and to have the will ſet aſide, as far as it was prejudicial to the right of his wife, as a daughter of a citizen of *London*; or to the right of the widow, as the wife of a citizen.

Upon the pleadings the caſe came out thus:

Ibbot, the teſtator, had by his firſt wife iſſue *Anne Barker*, the defendant; and by the ſecond (his preſent widow, one of the plaintiffs), *Eſther Blunden* married to the plaintiff, againſt the conſent of the father. Upon the marriage of *Mr. Ibbot*, the teſtator, with his ſecond wife, now widow, there were articles of agreement precedent to the marriage, entered into by *Mr. Ibbot* and the preſent widow. The ſubſtance of which articles were, that *Mr. Ibbot* ſhould leave her, at his death, an eſtate in land for her life of eighty-five pounds a-year, four hundred pounds in money, and all her jewels; and that ſhe ſhould enter into a bond of three thouſand pounds penalty, in truſt for *Mr. Ibbot*; the condition of which bond was, that if theſe terms were made good to her, ſhe would, within two months after the death of *Mr. Ibbot*, releaſe to his executors all right and title that ſhe might have to any part of his eſtate real or perſonal, by dower, cuſtom of *London*, or otherwiſe. The bond was entered into accordingly; and in the year 1684 the match took effect. * In the year 1706 *Mr. Ibbot* married his eldeſt daughter *Mrs. Barker*, and gave her for her portion, as appeared by the marriage ſettlement, four thouſand pounds in money, beſides lands and tenements (amongſt which there was the reverſionary intereſt of a leaſe) to a conſiderable value. To this ſettlement, among others, *Mr. Ibbot* the father was a party; and the certainty of *Mrs. Barker's* advancement appeared no otherwiſe than by the father's being a party to this ſettlement, wherein no value was put either upon the freehold eſtate, or the rever- * [452]

 ſionary

Blunden *against* Barker. ſionary intereſt of a leaſe ſettled upon her. But precedent to the marriage, the father thought fit that *Mrs. Barker* his daughter ſhould, before her marriage, execute to him a releaſe, to which the lawyer that drew the ſettlement, and *Mr. Barker* the intended huſband, ſhould be parties; wherein his daughter ſhould, in conſideration of her preſent advancement, releaſe to her father, his executors and adminiſtrators, all intereſt, right and title, &c. that ſhe had or ſhould have to any part of his eſtate, real or perſonal, by cuſtom of the city, ſtatute of Diſtributions, or otherwiſe; ſave what her father ſhould pleaſe to give her by his laſt will. And this releaſe was accordingly executed. *Mrs. Barker*, before this, had ſome ſmall matter in land and money left her by other relations, the intereſt and profits of which were received by the father; but no account was ever made up between them. Some time after this, *Mr. Blunden*, the plaintiff, married the other daughter of the teſtator *Ibbot*, without his conſent. Afterwards *Mr. Ibbot* made his will, which, as far as is material to this diſpute, was to this purpoſe: He gave to his wife during her life the intereſt of ſo much *Bank* and *Eaſt-India* ſtock as amounted to twelve hundred pounds a-year. He gave his two grandchildren
[453] by * *Mrs. Barker* five thouſand pounds a-piece; then he gave a leaſehold eſtate in truſt for *Mr. Blunden*, during the life of his wife, and after her deceaſe, in truſt for the children of *Mrs. Blunden*, and in default of ſuch, in truſt for his own right heirs. He gave all his real eſtate to *Mrs. Barker*, and likewiſe makes her reſiduary legatee of all his perſonal eſtate. *Ibbot* died, leaving a very conſiderable eſtate, both real and perſonal.

The points in this cauſe were three:

First, Whether *Mrs. Ibbot* the widow be barred, by the articles of agreement and the bond, from claiming her cuſtomary ſhare?

Secondly, If ſhe be barred, what is to be done with her cuſtomary ſhare, *viz.* Whether the huſband is to be conſidered as dying without a wife? and ſo the eſtate is to be divided into two moieties; the one moiety to go among the children, the other moiety to be the teſtamentary part of the teſtator. Or whether this agreement, by which the wife is barred, being founded upon the conſideration of a ſettlement upon her of a real eſtate, *Mr. Ibbot* ſhould not be conſidered as a purchaſer of his wife's third, and ſo have a right to diſpoſe of two-thirds of his eſtate by will?

Thirdly, Whether *Mrs. Barker* in this caſe was barred from claiming her cuſtomary ſhare? either upon account, first, of the releaſe executed to her father; or, secondly, for want of a ſufficient certainty of her advancement appearing under the hand of the father.

In caſe the widow is barred, and the huſband is to be conſidered as a purchaſer, and *Mrs. Barker* is barred, *Mr. Blunden*, in right

of

of his wife, will be intitled to one-third of the perſonal eſtate of the teſtator. BLUNDEN *againſt* BARKER.

In caſe the widow is barred, *Mrs. Barker* barred, and the huſband is to be conſidered, not as a purchaſer, but as dying without a wife, then *Mr. Blunden*, in right of his wife, has a clear title to a moiety.

* But in caſe the wife is barred, and the huſband is to be conſidered as a purchaſer, and *Mrs. Barker* not barred, then will *Mr. Blunden*, in right of his lady, be intitled only to a moiety of the third part of the perſonal eſtate of the teſtator. *[454]

This cauſe coming to a hearing before SIR JOSEPH JEKYLL, *Maſter of the Rolls*, he was pleaſed to decree:

FIRST, That the wife was barred: But what the conſequence of that was, whether the huſband was to be conſidered as dying without a wife; or whether, in regard the wife was compounded off by the ſettlement of a real eſtate, the huſband was to be conſidered as a purchaſer of his wife's third; he ſent to THE CITY, to be certified what their cuſtom was.

SECONDLY, He decreed *Mrs. Barker* barred, both by the releaſe, as a ſubſiſting agreement in equity; and alſo becauſe there was not ſuch a certainty appearing under the hand of the father, as the cuſtom of the city required to let her in to claim her ſhare (*a*). And conſequently he was of opinion, that *Mr. Blunden* had in all events, in right of his wife, a title to one-third; but in caſe, by the cuſtom of the city, *Mr. Ibbot* was to be eſteemed as dying without a wife, then to one entire moiety of the perſonal eſtate of the teſtator.

Mrs. Barker not acquieſcing under the determination of THE MASTER OF THE ROLLS,

THE CAUSE was again brought on before PARKER, *Lord Chancellor*.

In ſupport of the decree of the Maſter, and in favour of *Mr. Blunden*, IT WAS INSISTED UPON, that the wife may by an agreement before marriage bar herſelf of her cuſtomary ſhare; and that when this is done, the huſband is always conſidered as dying without a wife; and no difference made when the eſtate, by which the wife is thus compounded off, is real, and when perſonal. In the caſe of *Hancock v. Hancock* (*b*), the wife was barred by a jointure of land; and yet held expreſsly, that the * eſtate ſhould be divided into moieties. In the caſe of *Rawlinſon v.* *[455]

(*a*) But not by 11. *Geo.* 1. c. 18. ſ. 17. it ſhall be lawful for all perſons who, after the firſt of *June* 1725, ſhall become free of the city, and for all who at that day ſhall be unmarried, and not have iſſue by any former marriage, to diſpoſe of their perſonal eſtate.

(*b*) 2. Vern. 665.

 Rawlinſon,

BLUNDEN *against* BARKER.

Rawlinson (a), the wife was compounded off out of a real estate; and yet held, that the husband should have a moiety for his testamentary share. In the case of *Clare v. Auchmuty (b)*, the children were all advanced in full; and it was held, that in that case the father was to be considered as dying without children, and the estate was to be divided into moieties, the one moiety to go to the wife, the other to be the testamentary share of the father; and not at all considered, what the nature of the estate was, whether real or personal, out of which the children were advanced.

It was urged, that as to the bond given by the wife, though in law it can bind no further than the penalty; yet in equity, the bond and articles make but one agreement: and therefore not in the liberty of the wife, by incurring the penalty of the bond, to free herself from the agreement.

As to the release given by *Mrs. Barker*; it was acknowledged, that at law, as a release, it would be void; but it was urged, that it would subsist as a good agreement in a court of equity.

It was urged, that if a jointure made precedent to marriage, could bar a woman of her dower; and that if a woman could, by an agreement precedent to marriage, bar herself of her customary share; in neither of which cases the woman has so much as an inchoate right at the time of the bar: *a fortiori* may a daughter release that right which as a right is already by her birth vested in her, though not to take effect in possession until the death of the father.

As to the objection, that if the father be allowed to take releases from his children, it will leave room for the father to impose upon his children, by that authority that a father has naturally over his child: it was answered, that this was not the case here; the * advancement was a very handsome and a very considerable one; and the intended husband and the lawyer that drew the settlement were witnesses to the release. Besides, if fathers cannot take releases from their children, some way or other, it will be a discouragement to fathers from advancing children in their life-time. And in the last place, the father has it in his power, as the custom now stands, to cut off his children from their customary share; for it is but to give them some inconsiderable advancement, and take care not to let it appear under his hand what the advancement was, and the thing is done; it having been settled in the case of *Foke v. Edwin*, that an advancement in marriage will cut a child off, provided the certainty of that advancement does not appear under the hand of the father. Upon all these accounts it was inferred, that the objection taken against these releases, from the power it would give parents to impose upon their children, had very little in it.

* [456]

As to the certainty it was urged, that the decree of the Master was right: first, because the father being indebted to the daughter,

(a) Prec. Chan. 537. (b) 2 Vern. 666.

for

for interest of money, and profits of land by him received at the time of this release, and this account having been never adjusted, it was now utterly impossible to do it; and consequently impossible to know the certainty of that advancement, which was the remainder after the debt deducted. BLUNDEN against BARKER.

Another reason of the uncertainty of the advancement was, because no value was put upon the reversionary interest of the lease, nor of the freehold lands in the settlement.

It had been very easy for the father, to have put a value upon these things; but it seems to have been omitted on purpose to corroborate the release, that upon supposition the release should not prove effectual for the cutting her off, the uncertainty of the advancement in this settlement might.

* If it should be said, that *id certum est quod certum reddi potest*; and that this advancement, how uncertain soever it be upon the settlement, is yet capable of being reduced to a certainty; * [457]

It may be answered, that it is true it may so, *viz.* by the chargeable and dilatory way of either a trial at law before a jury, or by an account before a Master; but this is not such a certainty as the custom requires, which on purpose to avoid these inconveniencies, has fixed and prescribed the way, by which this certainty is to appear, *viz.* the hand of the father. If this were not so, the custom as to the certainty would signify just nothing; for there is nothing but may some such way be reduced to a legal certainty.

If it be objected, that the custom not extending to land, the uncertainty of the freehold estate is not material: the answer is, that though the custom does not extend to land, yet the real estate as well as the personal, making part of the consideration upon which this release was given; it seems not reasonable, that she should be released from the agreement, and yet retain so material a part of the consideration of this agreement. This falls in with the equity of the cases of jointures, where it is held, that though a jointure after marriage, in consideration the woman shall quit her dower, will not bind her from claiming her dower; yet equity will interpose, hold her to her election, and not let her have both.

In the case of *Atkins v. Waterson*, a citizen of *London* jointures his wife before marriage with land, to which the custom did not extend. *Lord Chancellor* sent to the city to certify, Whether this jointure did not bar her of her customary right? It was certified, that it did not; because not made in bar of her customary part; but that had it been made in bar, it would have bound her. Rep. of Cases in Equity 94.

PARKER, *Lord Chancellor*. It seems to me, that admitting the custom of the city in general to be, that * the husband does not become a purchaser of his wife's third, when before marriage she agrees to accept of a settlement out of *land* in bar of her customary share, any more than he would in case the settlement had been of personal estate; yet notwithstanding, as this particular case is circumstanced, the husband must be considered as a purchaser; and * [458]

consequently

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consequently will have two-thirds of his estate for his testamentary share. Suppose, without any precedent agreement, the wife had, after the death of the husband, released to the executors of her husband all her right to her third by the custom, must not the executors of the husband have had the benefit of the release? No doubt they must. If so, What difference in reason is there, when the same thing is done in pursuance of a precedent agreement, and when without? The notion, that in this case the husband is to be considered as dying without a wife, does necessarily suppose the wife's third so totally destroyed, as to have no more subsistence, either in law or the consideration of the parties, than if the testator had never married: but here it is very plain, that the wife's right to her customary share does still subsist, both in law, and in the consideration and intention of the parties, as a collateral security to the wife for the husband's performing his part of the agreement; because, had he failed, she might have claimed her third.

Where the husband is to be considered as dying without a wife; and where as a purchaser of her customary third.

As to the release executed by *Mrs. Barker*; when the meaning of the parties, the person applying to this Court to make the release bind, and the will, come to be considered, I think it clear, *Mr. Blunden* is not intitled to reap any advantage from it. *Mrs. Barker*, in consideration of her marriage advancement, releases to her father "all right, &c. that she shall have to any part of his estate, "either by statute of Distributions, custom of *London*, or other- "wise, *save what he shall be pleased to give her by his last will.*"
* [459] Now what * is to be understood by this clause, "save, &c."? It cannot be save what he should give her out of his own testamentary share; for then it signifies just nothing, for the release did not extend to that, nor could the parties think it did. It must then have relation to some part of the estate, which, it was thought by the parties, the release did cut her off from. And then the meaning must be this (and a very natural meaning it is), that in consideration of so handsome a settlement as I now make you, you shall promise me to be content with such part of your customary share, as I shall think fit to give you by my will; and consequently it was the meaning of the agreement, that the father should be considered as a purchaser of his daughter *Barker's* customary share. And then the meaning of the agreement, which in a court of equity is chiefly to be considered, will be equally prejudicial to *Mr. Blunden's* right, as if it was left to its fate at law, where doubtless it would be void. As to the person that now applies to make this release good; it is to be considered, that it is not the father to whom this release was executed, that comes into this court, to have the benefit of it; but it is a daughter married against the consent of her father, that comes into this Court, to support a release void at law, as an agreement in equity, in order, in a great measure, to break in upon the will of her father, to whom the release was executed. It seems to me a very harsh doctrine, and what, it may be, was never done, for a third person to come into a court of equity,

Where an agreement is void at law, equity will not carry it into execution in favour of a third person, and contrary to the meaning of the parties.

to

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to enforce an agreement void in law, in direct opposition to the meaning of the parties to the agreement. The father had during his life an absolute power over this release, and might, if he had pleased, have discharged his daughter from being bound by it. * The question is, Whether he has not done that which was equivalent to it? It seems to me that a will, whereby he has given her all her customary share, is virtually and in equity a plain declaration, that it was never his intention she should be cut off from this share by virtue of her release. * [460]

If the certainty of a child's advancement does not appear under the father's hand, it is cut off from claiming a share by the custom. Salk. 427. 2. Vern. 630.

Advancement by land, no bar to the custom. 2. Vern. 754.

If therefore, for these reasons, the release will not stand in her way, the next thing to be considered is, whether the certainty of her advancement does appear under the hand of the father, in such a manner as the custom requires; for if it does not, then this advancement will cut her off from coming in. And here the question is no more than this, Whether the certainty of her advancement does sufficiently appear in the marriage settlement? for, the father being a party to it, whatever appears there, does appear under the hand of the father. As for the uncertainty of the freehold estate, that is nothing to the purpose; for the custom extends only to personal. The personal estate in this settlement is four thousand pounds in money, expressly declared in part of her fortune; and the reversionary interest of a lease, without any value put upon it.

If it appear under the father's hand what things were given a child, the advancement is sufficiently certain, though the value of them be not expressed.

The first objection against this being a sufficient certainty, is the uncertainty of the value of this reversionary interest of the lease. In answer to this, it is to be observed, that the custom of the city is not, that the certainty of the value of the advancement, or the certainty of the sum, but the certainty of the advancement must appear under the hand of the father (*a*). It seems to me that there cannot be a greater certainty, and less possibility of fraud or collusion, than when the thing itself given to the child appears under the hand of the father (*b*). If a father should say that * he had given a child such a diamond necklace, describing it, is not this better than if he should put a value upon it? It may be more, it may be less than the true worth? Besides, had this reversionary interest of this lease remained part of the testator's estate *tempore mortis*, it must have been valued, and may therefore as well now. * [461]

The second objection against the certainty is, that *Mrs. Barker* had both money and land left her by another ancestor; and that her father received in her right the interest of the one, and the profits of the other, and was at the time of the marriage a debtor to his daughter upon this account; and that therefore it is impos-

(*a*) Fawkenor *v.* Watts, 1. Atk. 406.

(*b*) See Dean *v.* Lord Delawar. 2. Vern. 628. and the certificate made in this case, 1. Peer Wms. 643. *notis.*

sible

fible to know the certainty of that advancement, which is the remainder after this debt deducted. The reafon why the cuftom of the city requires the certainty of the advancement to appear under the hand of the father, is certainly in favour of the unadvanced children, that the whole of the advancement may be thrown into hotchpot. If therefore it does plainly appear, that a child has not been advanced more than fuch a fum, for inftance four thoufand pounds, nay, that the child has not been advanced quite fo much, but it is only uncertain how much fhort of that fum the advancement was, by reafon of a trifling debt to be deducted, that cannot be reduced to a certainty; without doubt fuch an uncertainty may be cured, by the advanced child's quitting entirely this debt, and bringing in the whole four thoufand pounds, for the unadvanced children cannot be prejudiced, by bringing more than the advancement was. Not to admit this for an anfwer were to reduce the cuftom of the city to this abfurdity, that when a man has a right to fo much and more, he fhall lofe that to which he has a certain right, becaufe he cannot tell how much more he is intitled to.

Where it appears a child has not been advanced above fuch a fum, but fomewhat lefs; the uncertainty of the advancement may be cured by the child's bringing the whole fum into hotchpot.

* [462] * If, therefore, *Mrs. Barker* quits her debt (*a*), this objection is at an end: but it is capable of another anfwer, if this were infufficient. *Mrs. Barker's* marriage portion confifted both of real and perfonal eftate. If now the freehold eftate, to which the cuftom does not extend, be efteemed to go in fatisfaction of the debt; then the uncertainty of the debt will not create any uncertainty in the advancement, as far as the cuftom of the city is concerned in it. And this feems agreeable to the juftice of the Court in other cafes; as where a man indebted by fpecialties and fimple contract dies, leaving both a perfonal and real eftate, this Court will not fuffer the debts by fpecialty to be flung upon the perfonal eftate; and that being exhaufted, leave the debts by fimple contract unfatisfied, the land not being liable to pay them; but will decree the debts by fpecialty to be fatisfied out of the land, and the debts by fimple contract out of the perfonal eftate. If, in this cafe, the real eftate had not been fettled upon *Mrs. Barker* upon her marriage, but left her by will, *Mr. Blunden* would have thought it very hard, that this debt fhould have been difcharged out of the perfonal eftate, and fo leffen his wife's fhare; when her fifter had fo confiderable an eftate in land left her, out of which this debt might have been deducted.

As to the demand of the widow, *Mrs. Ibbot*, that fhe fhould not be bound further than the penalty of her bond; there is very little in it. For I efteem the bond and articles of agreement before marriage, to make but one entire agreement; and the penalty of three thoufand pounds, as circumftances then ftood, was thought more than a fufficient penalty for the enforcement of it. And

(*a*) See Green v. Green, 3. Peer Wms. 315. Medcalfe v. Ives, 1. Atk. 63. Morris v. Burroughs. 1. Atk. 399.

though

though this happens to prove otherwise, by an unexpected increase of the testator's estate; yet certainly a court of equity will hold her to her agreement. BLUNDEN *against* BARKER.

* Upon the whole, it seems clear to me, that *Mr. Blunden* is, in right of his wife, intitled only to one half of a third of the personal estate of the testator (*a*). * [463]

(*a*) See the order 1. Peer Wms. 645.

EASTER

EASTER TERM,

The Eighth of George the First,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*

Sir Joseph Jekyll, *Knt. Master of the Rolls.*

Lady Coventry, Widow of Gilbert Earl of Coventry deceased, *against* The present Earl of Coventry, the youngest Brother of Gilbert deceased, and Lady Anne Carew, the Daughter and Heir, and sole Executrix, of the said Gilbert. Case 224.

Tenant for life, with power to settle 500l. *per annum* out of such and such lands on a wife, enters into marriage-articles, by which he covenants, for himself and his heirs, &c. that he or his heirs would, in pursuance of this power, or otherwise, settle 500l. *per annum*. The marriage takes effect, and a settlement is drawn accordingly by his direction, of such lands as were comprized within the power; but never executed. THE QUESTION was, Whether this should bind the remainder-man? or, Whether the wife should have satisfaction made her out of the personal estate? AND DECREED, upon a second hearing, that the lands should be settled.—S. C. Comy. 312. S. C. 1. Eq. Abr. 348. S. C. 2. Eq. Abr. 673. S. C. 9. Mod. 13. S. C. Gilb. E. R. 160.

THIS was a bill brought in the court of chancery to hold and enjoy five hundred pounds a-year of the real estate of *Gilbert* late *Earl of Coventry*, pursuant to the power reserved by the will of *Thomas* the father, and the marriage-articles entered into by *Gilbert* precedent to the marriage with the plaintiff; or to have a satisfaction out of the personal estate of *the Earl*; to have likewise a legacy of three thousand pounds given her by the will of * her husband; and some other provisions made for her jointure by these articles; for as her portion was ten thousand pounds, so it was agreed in the marriage-articles that she should have a thousand a-year in land or money for her jointure.

THOMAS *Earl of Coventry*, the father of the said *Gilbert*, settled his estate by his will, bearing date *March* 24, 1698: which settlement, as far as concerns the present question, was to *Gilbert* his son for his life; then in tail-male to the first, second, &c. sons of *Gilbert*; remainder to his second son the present *Earl of Coventry* for his life; remainder in tail-male to his first, second, &c. sons; and so on. And further on in the will this clause was added: "PROVIDED NEVERTHELESS, that notwithstanding anything "herein-before contained, it shall be lawful for any person or

"persons

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"persons that shall become seised of lands or tenements under the "limitations of this my will, by any writing under his or their "hands and seal, to limit or appoint any lands, not being copyhold, "nor leased out for lives, not exceeding in the whole five hundred "pounds *per annum*, to any wife for her jointure, that shall bring "with her a portion equivalent to such jointure." GILBERT late *Earl of Coventry* entered into marriage-articles, bearing date the twenty-third of *June* 1715, by which, in consideration of a portion of ten thousand pounds paid, he covenants for himself, his heirs, executors, &c. with *Sir Strensham Masters*, the father of the plaintiff, his heirs, &c. "that he, or his heirs, should, by deed "indented, &c. at the request of the father, but at the charge of "the earl, his heirs, executors, &c pursuant to this power reserved "by the will of his father, or otherwise, settle upon the plaintiff "for her jointure, or procure to be settled, lands of the full value "of five hundred pounds a-year." * He further covenants to [*[465]] settle upon her, for an addition to her jointure, an annuity of two hundred and fifty pounds a-year during her life; and that five thousand pounds of her fortune should be laid out in land, wherein she was to have the term of her life for her jointure, or the interest of the money until the land should be bought from and after her husband's decease. The marriage took effect, the portion was paid, and about two thousand pounds laid out in presents. *Gilbert* the late earl, immediately after his marriage, desired one *Charles Parsons* to consult with his steward what lands were the properest to be settled in pursuance of these articles; and upon a diligent search into his estate, and the settlements of the family, they could find no other manor but that of *Woolvey* proper to be settled, and that was but four hundred pounds a-year. This steward leaving his lord's service, and dying quickly after, occasioned further delay, the new steward being for some time unacquainted with the concerns of the family. But *the Earl* often expressed great uneasiness at this delay. And afterwards, upon looking for another manor to make up the five hundred pounds a-year, they pitched upon one that had an incumbrance upon it that was necessary to be first cleared. But however, at last, instructions were given and sent to *London*, to be laid before Counsel, for preparing a draught pursuant to the articles. The draught was prepared, engrossed, and sent down to *the Earl*, to be by him executed in the country. *The Earl*, after the engrossment of the deed, being told what lands were to be settled by this deed, approved of their choice; but the actual execution of the settlement was prevented, once by an accidental visit of *Mr. Sandys*, afterwards by illness, and at last by the sudden death of *the Earl*. When *the Earl* expressed his uneasiness upon the disappointments he had met with in making this * settlement, [*[466]] he was told by Counsel, he might be very easy; for that if he should die, a court of equity would esteem it as done. At the time when *the Earl* made his will, which was the day he died, there was a man and horse sent to the steward, who happened to be fifty miles off, and had the keys of the place where the engrossed deed lay; but

But before the steward could come, *the Earl* died. By the will he gave his wife, over and above what was agreed to be settled upon her by the marriage-articles, a legacy of three thousand pounds. The defendant *Lady Anne Carew*, daughter of *the Earl* (who died without issue male), and executrix of his will, swore in her answer, that in case the five hundred pounds a-year was to be flung as a burthen upon the personal estate of her father, there would not be assets enough to answer all the demands of the plaintiff.

Lady Coventry *against* the Earl of Coventry and Lady Anne Carew.

Sir Robert Raymond, Sir Philip Yorke, Serjeant Cheshyre, and Mr. Mead, *Counsel for the plaintiff*, and the defendant *Lady Anne Carew*, who joined with the plaintiff in order to throw the burthen off the personal estate, argued, that these sorts of powers receive always in a court of equity a large and favourable construction; being powers given to those who, had it not been for such settlements, in which these powers are contained, would have been tenants of the fees themselves. This was used as a reason, by *Chief Justice* Holt, for a large interpretation of these powers, in the case of *Sir Charles Orby v. Lord Mohun*, in Lord Cowper's time. It was observed, that these marriage articles want but one circumstance, *viz.* a certainty of the lands, to make them, in point of law, a perfect execution of the power; but that this defect, *viz.* want of certainty, was now remedied, at least in equity, by * the steps that had been taken, in the most solemn and deliberate manner, towards the execution of this settlement. * [467]
It was said, that a court of equity will look upon a thing covenanted to be done, and intended to be done, as done; and in case of a legal defect in the execution of it, aid and assist that defect: but indeed this must be understood of settlements, executions of powers, &c. founded upon valuable considerations, not voluntary ones. The present case is the case of a jointure, which is always favoured, because it comes in lieu of dower. The case of *Onions v. Tyrer (a)* was a case before Lord Cowper, where a former will appearing to have been cancelled for no other reason but because the testator thought he had made another to the same effect, which proved not to be duly executed, it was determined, that equity would set up the former will again. In the case of *Parker v Parker (b)*, a man having power to charge lands for younger children, by a writing under his hand, attested by three witnesses, did in fear of sudden death, and being absent from home, by a paper attested by two witnesses, charge his estate with seven thousand pounds for his children; and this defect was supplied, because occasioned by his being absent from home, and so not being able to have a sight of the deed where this power was contained. In the case of *Smith v. Ashton (c)*, the power was to charge lands, by deed or will in writing under hand and seal; the deed in which this power was, was a voluntary one; and in the execution of this

(a) 2. Vern. 741.

(b) Rep. Eq. 168. cited Stra. 6c4 — See also Thwaites v. Day, 2. Vern 80. and Powel on Powers, 189.

(c) 1. Ch Cases, 264.

power,

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power, the circumstance of a seal to the will was wanting; yet this defect was aided. For circumstances are but cautions to prevent imposition, the substantial part is to do the thing; and therefore when it is clear and indubitable that the thing was designed to be done, the neglect of circumstances shall not avoid the act in equity. * In the case of *Hele v. Hele* (a) it was said, that if *de facto* the

* [468] power had been executed, equity would have supplied the defects; for circumstances are only annexed to powers to prevent frauds. In the case of *Peach v. Winchelsea* (b), LORD COWPER seemed to be of opinion, that in case of a covenant to convey land, the money being paid, a judgment confessed to a creditor, between the time of the covenant and the conveyance, should not affect the purchaser; because in equity the land is esteemed to be sold from the time of the covenant. *Justice* POWELL, in his argument in the case of *Bath v. Mountagu* (c), admits, that even in case of a revocation, which is not so much favoured, a court of equity may interpose in a case of disability; as if the *Duke of Albemarle* had taken the deed over with him to *Jamaica*, and there, having an intention to revoke it, had gone as far as he could, by making his will with six witnesses, that this should have been made good, though none of the witnesses were peers, because of the disability he was under to get peers. It was argued, that though possibly it might be objected that the present case did not come directly within the authority of the cases quoted, because here the plaintiff did not come into equity to establish a conveyance already executed, and only attended with some trivial legal defect, but to set up a conveyance that had not been at all executed; yet it did within the reason of these cases; for all the preparations that were from time to time taken, in order to the execution of it, manifest as fixed and resolved an intent to have executed it, as if it had actually been done. And to speak properly, a deed or power executed but defectively in some legal circumstance, is really not executed in point of law at all; so that in that case, a court of equity may be said to set up a conveyance not executed, because in point of law

* [469] the whole execution is null and void. * Had this draught engrossed been a will, it had been a good will within the statute of 32. *Hen.* 8. c. 1. and before the statute of Frauds; for that statute does not require the will to be of the hand-writing of the testator, but only to be reduced to writing by his direction. A covenant to sell and convey is so far considered in equity, as that the Court will compel the heir to join in the sale, though this be to his disinherison; for the money will go to the executors. It is true, that where a tenant in tail contracts for the sale of land, and dies before execution, the Court will not carry this into execution against the issue. But the reason of this is, because it is contrary to the intention of the first donor, who designed, as the statute *de Donis* says, that the estate should remain in the blood, &c. But yet if a tenant in tail, having a power to make leases for three lives,

(a) 2. Ch Rep. 29.
(b) 18. Viner Abr. 118.
(c) 9. Mod. 14.

should

should covenant to make such a lease, and die before execution, the Court would carry this into execution against the heir, though they would not a sale. The case of *Barkham v. Barkham* was a case in the LORD SOMERS's time, wherein he decreed a defective jointure to be made good against those that claimed under a marriage-settlement, and within the consideration of the marriage-settlement. There may possibly be cases where a court of equity has refused to do this, *viz.* to support or make good conveyances defective in some legal circumstance; but then this has been when it was demanded in favour of voluntary provisions. This five hundred pounds *per annum* jointure is but a small incumbrance in comparison of what the estate of the present earl is able to bear; and he is one that will be the less favoured in this court, upon account of his being a volunteer. * It was further urged, that as accident is one great branch of the jurisdiction of this court, no case could ever come before it attended with more and stranger incidents of this nature to be entitled to relief, than the present. The great difficulty of finding out lands free from those incumbrances mentioned in the original power, death of the steward, fear to come up to *London* on account of the small-pox, the accidental visit of *Mr. Sandys*, the illness of *the Earl*, his lady's tenderness for his health not suffering him to be discomposed by business, and the suddenness of his death when the physicians thought him out of danger, are all so many accidents concurring to prevent the execution of this deed, and which cry for relief in this court. It was likewise said, that the opinion of Counsel in this case would be considered as a favourable circumstance, who all informed *the Earl*, he need not be uneasy; for if he died, a court of equity would consider this deed as executed.

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MR. COWPER, *Counsel for the present Earl.* The question here is not, whether a court of equity will supply some slight defects in the execution of a power, but whether this court will entirely supply a non-execution; and that in favour of a person not without remedy. For she has a covenant that binds the heir at law, and the personal estate that the heir as executrix is intitled to; which, we say, will, upon inquiry, be found to amount to two thousand pounds over and above the five thousand pounds covenanted to be laid out in land (wherein the plaintiff is only to have her life), and the two hundred and fifty pounds annuity. So that it cannot be pretended, that in this case here is any want of provision; there is one almost adequate to the fortune, though she should not succeed in what she now prays against the present earl. * *Chief Justice* HOLT, in his argument in the case of *Bath v. Mountagu*, strongly insists upon it, as a fixed and settled point in law, that powers are to be strictly pursued; because created by the owner of the land, in which case *stat pro ratione voluntas.* When a court of equity decrees conveyances to be made and powers to be executed, it is always in cases attended with circumstances of such weight as to make it appear fit and proper to be done in the judgment of mankind; and without such circum-

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stances, a court of equity will never do it; it being *pro tanto* a departure and variation from the common law. As to a surrender in case of copyholds; there is no doubt but this Court may supply a defective surrender, or decree one where there is none at all; but though the Court may do this, surely it is not bound to do this, and in all cases, and only because it is asked. No; it is to be done upon particular circumstances (as equity cases turn upon circumstances), and in favour of purchasers, or persons that in law or equity are considered as purchasers; as a wife and children unprovided for. Therefore LORD SOMERS, in the case of *Kettle v. Townsend* (*a*), decreed a conveyance of a copyhold in favour of a grandchild unprovided for; but the house of lords reversed the decree, as thinking the Court had gone too far in extending this power to grandchildren. And this Court has refused to supply a defective surrender in the case of a wife provided for before. If the cases quoted for the plaintiff be re-considered, some circumstances will be found attending upon them as will turn them into so many authorities in favour of this earl now defendant. As to the case of *Smith v. Ashton* (*b*), *Chief Justice* HOLT takes notice of it, in his argument in the case of *Bath v. Mountagu*; and according to him, the indulgence a court of equity ever shews to provisions made for younger children was the chief ingredient in the case. * Besides, one very material circumstance, as it is reported in 1. *Chanc. Cases*, 265. was omitted, when quoted by the Counsel for the plaintiff, which was, that an issue was directed to be tried at law, Whether such notes in writing were part of the last will of *Ralph Ashton*? and being found by the verdict to be his will, and in favour of younger children thus provided for, the Court decreed the power well executed, though the circumstance of sealing was wanting. But is this an authority that the Court should in the present case, in favour of one so amply provided for otherwise, decree the execution of a power *ab origine*, where it was not executed at all? As for the case of *Hele v. Hele*, it is indeed the case of a jointure, but as there is no decree in it, the authority of it cannot be great; and the Counsel in quoting it seemed to make use of it under the head of accident. But certainly the pretence the plaintiff sets up to be relieved in this court, under the head of that branch of the jurisdiction of it (Accident), is the most groundless in the world. The articles were made in the year 1715, the Earl died in 1719, four years and a half intervene, and yet, according to them, it must be esteemed an accident that he died before he could make the settlement in pursuance of the articles; and to support this part of the case, the evidence gives us a history of his steward, his gout, the doctor, and the bath. If it must be looked upon as an accident that a man dies in four years, why not in eight? nay, in eighty? I know not where to put the bounds. Were it proper or convenient to enter into the particular circumstances of this noble family, it would appear, that the present earl

Salk. 187.

Bircoe v. Cartwright, 1716, Rep. of Cases in Equity, 121.

Ante, 467.

2. Vern. 164.

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Ante, 468.

Ante, 470.

(*a*) 1. Eq. Abr. 123. 1. Salk. 187. 263. Finch C. R. 273. 1. Freem. 308.
(*b*) 1. Eq. Abr. 335. 1. Chan. Cases, 3 Salk. 271.

is not so amply provided for, considering all the incumbrances upon his estate; and therefore it would be still harder for this Court to interpose to his prejudice, and in favour of one otherwise so well provided for as this lady is. * In the case of *Sir Charles Orby v. Lord Mohun*, where LORD COWPER was assisted by *Chief Justice* HOLT and other Judges, a bill was brought to have a defective execution of a power of making leases supplied. In the power it was expressly enjoined, that the ancient rent should be reserved; in the execution of the power the ancient rent was reserved, but not said what the ancient rent was. This, though such a defect as this Court by sending it to a master might have supplied, yet this Court would not interpose, because to the prejudice of a third person, the remainder-man. This most certainly is a precedent, that what is now desired of the Court is a discretionary power, to be exercised by this Court as the circumstances in every particular case shall direct. The case of *Piggot v. Penrice* (*a*), in LORD COWPER's time, in the year 1717, was this: A wife having a power, in a settlement she had made in favour of her husband, to revoke the uses and limit new ones, writes to one to prepare a deed to revoke the uses, and settle the same upon such a relation; in which letter she takes notice of this power in the settlement that did enable her so to do. Falling ill, she sends another letter, pressing the preparing of this deed, for that it was her absolute will to revoke the uses, and give her estate to this relation. In this case the Court declared, that they would not interpose; that they must judge by what she had done, not by what she intended to do. Had she been hindered from the exercise of this power by the act of her husband, then, the Court said, they would have interposed. So possibly in this case; had the execution of this power been prevented by the art and contrivance of the present earl, it had been a reasonable ground for this Court to interpose.

LADY COVENTRY *against* THE EARL OF COVENTRY AND LADY ANNE CAREW.

2. Vern. 531. 542.

Rep. of Cases in Equity, 137. See Com 250.

* MR. TALBOT. It must be admitted, that the limitation by which the present earl enjoys is a voluntary conveyance: but then it must be considered, that he claims under the will of the father of the late earl; and so by a title paramount to that of the late earl, who was himself a volunteer; and then I do not see, how one volunteer deserves more favour than another. It is said, that the present earl claims under a limitation clogged with this power, which is true. And had *Earl Gilbert* been pleased to execute that power, which he was perfectly at liberty to do or not, the present earl must have submitted to it; but since the power is unexecuted, it is just the same as if there had been no power at all ever created. The executing, or not executing, of this power was a mere contingency; and as *the Earl* must have been bound, if the less favourable contingency had happened, it is very reasonable that since the more favourable contingency has happened, he should enjoy the benefit of it. The estate of the present earl is already clogged with two considerable jointures now subsisting, and other

* [474]

Ante, 496.

(*a*) Comy. 250. Prec. Ch. 471. Gilb. Rep. 137. 9. Mod. 11.—See also Powel on Powers, 157.

 incumbrances;

Lady Coventry *against* the Earl of Coventry and Lady Anne Carew.

incumbrances; so that were the intention of the creator of this power of any weight, it is very probable he would not choose to have the estate of the family incumbered at once with so many jointures, which does not so well answer the end proposed by him in creating the intail, *viz.* the supporting the honour and dignity of the family. It has been said, that these articles are, even in point of law, an execution of the power. If this were so, the plaintiff must take her remedy at law, not in equity. But there is not the least colour for this. For it plainly appears, from the wording of the articles, that however it might be primarily and originally the
*[475] intention of the parties to have made this settlement, in * pursuance of the power in the will, yet that they never intended to confine and restrain themselves to it. The covenant is, "that *Earl* "*Gilbert*, or his heirs, at the request of the lady's father, &c. "shall, by deed indented, &c. according to the power reserved by "the will of the said earl's father, or otherwise, settle, or procure "to be settled, lands of the value of five hundred pounds *per annum*, "for her jointure." The words "or otherwise" set the articles loose and at large as to the power; for it is very evident that the settling of any lands, though not within the power, would have been a good performance of the articles. The covenant is, that *Earl Gilbert* or his heirs shall do it; so that if the heir did it, it would be a good performance of the articles: but it is impossible, that a power given to any person claiming under that settlement to jointure his wife, can be an authority for a son (the heir) to jointure his mother. It is said, the plaintiff is a purchaser: it is true, she is so, but of what? Not of any lands comprized in the will of *Earl Thomas*, and to which this power extends. All that she is a purchaser of is a right to a jointure; and as a security for the performance of it, she has relied upon the personal covenant which binds *Earl Gilbert* and his heirs; and if there are assets sufficient for that purpose, these are proper to be applied in satisfaction of this covenant. And to make the largest and most favourable construction for her, she can only be esteemed a purchaser with respect to us *prò tanto* as the assets fall short of this five hundred pounds *per annum*. It has been said, that whatever a man does not give away from himself remains in him; and that whatever powers are reserved by the donor (being part of the old dominion he had over his own estate) ought to receive a large and benign interpretation. This rule, though true, is not applicable to the present case; for the person against whom this power is desired
*[476] to be executed is one that receives his estate from * the same bounty that he who should have exercised it did; and consequently, since both claim under the same title, and from the same donor, the one cannot challenge more favour than the other. It is a matter of the highest importance, that rules of law, the boundaries and fences of property, should remain fixed and settled, and be never broken in upon but with very good reason, and that too as seldom as possible; and consequently, a court of equity will not be forward to do it in favour of volunteers. Therefore in the case of *Arundel v. Philpot*,

Ante, 466.

2. Vern. 69.

v. *Philpot* (*a*), mentioned in the case of *Bath* v. *Mountagu*, where there was a settlement, with a power of revocation, upon the tender of a guinea; the plaintiff, claiming under a latter settlement made in pursuance of this power of revocation, could not prevail to set aside the first settlement, even in a court of equity, for want of being able to prove that little circumstance of the tender of a guinea; but being a volunteer, was sent to law to have it tried, revoked or not revoked. Indeed, at law, the party was so fortunate as to prove the tender. Tenant in tail covenanted to sell (*b*), received the money, stood in contempt to this court for not suffering a common recovery, and died in contempt, without doing of it; yet this Court would not compel the issue to do it. It is said indeed, that the reason of this is, because it is in derogation of the intent of the donor. But this, though specious, and what might have held at the time of making the statute *de Donis*, cannot be said with any reason at this day; for whoever gives an estate tail must be presumed to intend to give it with all the legal advantages. And as everybody is presumed to know the law, the donor must be presumed to know, that by proper ways and methods the tenant in tail may dispose of his estate, and be willing he should. * As to the power exercised by this court in marshalling of assets; this court never does it in favour of a residuary legatee; and where it is done, it is done for the sake of paying debts, and in such a manner as the creditors might have done themselves; and therefore where the heir at law can have no reason to complain.

LADY COVENTRY *against* THE EARL OF COVENTRY AND LADY ANNE CAREW.

Ante, 469.

* [477]

IT WAS REPLIED *for the plaintiff*, that notwithstanding what has been said to the contrary, this is a favourable case, being that of *a lady* who brought a great portion into the family, and will otherwise be stripped of a great part of that jointure she covenanted and paid a valuable consideration for. As to the objection raised from those words in the covenant "or otherwise," it is capable of two answers: FIRST, That it is a common caution or phrase made use of by conveyancers to prevent any danger that may arise from mistakes or misrecitals; or, SECONDLY, It may relate to the manner or form of the conveyance; for it is very improbable that it should relate to lands not comprehended in the power, the earl at that time having no other. In the case of *Smith* v. *Ashton* (*c*), the doctrine is fully laid down, that circumstances annexed to the execution of powers are but in the nature of cautions to prevent surprize; and therefore when the intent is plain, a court of equity will dispense with them. And as that case is quoted by MR. JUSTICE POWELL, in the case of *Bath* v. *Mountagu*, it is entirely put upon the accident of death preventing the execution of the power. The case of *Hele* v. *Hele* (*d*) was a case of a non-execution of a power; and though there was no decree, yet THE LORD CHANCELLOR, by directing the plaintiff to amend a fault

Ante, 467. 471.

Ante, 468. 474.

(*a*) 2. Vern. 69.
(*b*) Lanyon v. Williams; Weale v. Lower; Powell v. Powell.
(*c*) 1. Ch. Cases.
(*d*) 2. Ch. Rep. 29.

discovered in the bill, plainly declared what his sense was. * The distinction has always been taken between settlements perfectly voluntary, and those founded upon a valuable consideration. MR. COWPER has indeed advanced another, of provision and no provision; but cited no case in maintenance of this distinction. In the case of *Smith v. Ashton* (*a*) there was a collateral provision; and so it is an authority against that distinction. Indeed, in cases of voluntary conveyances the Court has thought the matter of provision or no provision fit to be regarded; but never in conveyances founded upon a valuable consideration. As to the objection, that had this power been reserved to the party himself, it would have received a large interpretation, but being to a remainder-man it must have a strict one; it may be answered, that this is a power reserved to a son, who without this settlement, being heir at law, would have had the whole fee in him; and therefore is intitled to the same favour; which is a reason allowed of in the case of *Sir Charles Orly v. Lord Mohun* (*b*). Indeed, as to the case itself, it was said to be fit to be left to the law; because a voluntary and peevish execution of the power. The cases of *Pigot and Penrice* (*c*), and *Arundel v. Philpot* (*d*), were cases relating to powers of revocation, not so much favoured by this court, and voluntary; so that though the Court denied relief, they did it upon grounds that we admit of. As to the case of tenant in tail, it is contrary to the intention of the donor, at least the primary one; though the law gives the tenant a power to defeat this intention in a proper manner. It is contrary to the statute *de Donis*, made in support of this intent of the donor; and though this statute has been so expounded, as that by feigned actions, &c. yet if that particular way chalked out by the law be not complied with, a court of equity may refuse to interpose. * In the case of *Lady Clifford v. Earl of Burlington* (*e*), *Lord Clifford* had a power to limit a jointure of one thousand pounds *per annum* on lands in *Ireland*. Upon his marriage he covenanted accordingly to settle a jointure of one thousand pounds *per annum*, sends to his steward in *Ireland* for particulars, which were sent, and the conveyance made; but after his death it was found, that the lands did not amount to more than six hundred pounds *per annum*. A bill was brought against the remainder-man to have the jointure completed; and decreed by SIR NICHOLAS WRIGHT against the remainder-man. That clause in the will of *Earl Gilbert*, wherein he gives her three thousand pounds over and above what was settled upon her by the articles, is a plain proof that he did look upon the articles as a good execution of the power by way of appointment. As to what was said, that this case cannot fall under the head of accident, because *the Earl* lived so long after the marriage; it is easy to answer, that four years or more may be as much apologized for and

Ante, 475.

Ante, 473. 476.

Ante, 476.

2. Vern. 379. Rep. of Cases in Equity, 167.

Ante, 466.

Ante, 472.

(*a*) 1. Eq. Abr. 345. 1. Ch. Cases, 264. Finch's R. 273. 1. Freem. 308. 2 Salk. 27[illegible].

(*b*) 3 Ch. Rep. 66.

(*c*) See Powell on Powers, 157. 160.

(*d*) 3. Ch. Cases, 70. Powell on P. 196.

(*e*) 2. Vern. 379.

covered

covered by accidents as one; and whether the present case be not such a one, must be submitted to the Court upon the evidence.

Parker, *Lord Chancellor*. As to the five hundred pounds a-year, the *Lady Coventry* has certainly a very strong and a very favourable case; there can be no question whether, though there may from whence, she ought to have it. It does not appear to me, but that the heir at law may literally perform this covenant; and then the controversy will be only between the present earl and the heir at law. I do not believe the defendant in her answer looks upon the five thousand pounds deposited for a purchase as assets; whereas the plaintiff being intitled to interest only for her life, the reversion is assets. * Suppose the plaintiff had brought her action at law, upon her covenant, against the heir at law; it deserves to be considered, whether the heir at law could have come into this court to have been relieved against the remainder-man, and to have had this land settled in ease of his personal estate, and discharge of the covenant laid on him by the ancestor. It is absurd to imagine, that the words "or otherwise" should relate to the manner of the conveyance; or that the settling of other lands, to the value of five hundred pounds a-year, than those comprehended in the power, would not have been a full performance of the covenant. And it is impossible that the heir making a settlement upon his mother could be supposed acting in pursuance of a power enabling a man to settle land upon his wife for her jointure. This is a case of great importance. Marriage-settlements and executions of powers are of daily use; and therefore I shall be very cautious of making precedents. I will not determine it without the assistance of some of the Judges; in the mean time I will direct an inquiry into the assets, that so I may know how far *Lady Coventry* is concerned in the question. The present earl being only tenant for life, no decree that I can make will bind the issue; and therefore it is more safe for *the Lady* to have a satisfaction out of the assets upon the covenant, if there be enough to answer all her demands. * [480]

N. B. When the cause came on again, the Judges that the Lord Chancellor called to his assistance were of opinion, that the marriage-articles entered into by *Earl Gilbert*, together with the deed of settlement drawn by his direction in pursuance of the said articles, was such an execution of the power reserved in the will of *Earl Thomas* his father as was binding in equity.

And accordingly IT WAS DECREED, that the plaintiff should have * for her jointure the lands mentioned in the said intended settlement. * [481]

Hill

Case 225. **Hill against Filking and his Wife.**

A devise of lands to a *Roman* catholic who is under eighteen years of age at the death of the testator, and conforms within six months after attaining that age, pursuant to 11. & 12. *Will.* 3. c. . is a good devise. S. C. post. 536.

S. C. 9. Mod. 154.

S. C. Cases Ch. 22.

S. C. 2. Peer. Wms. 6.

S. C. 2. Eq. Abr. 622. 624.

A GRANDMOTHER having no children, but only a grandson and granddaughter, and being a *Roman catholic*, she made her will on the 8th of *May* 1716, by which will she devised her estate to three trustees, whereof two were *Roman catholics*, the third a *protestant*. She devised the estate to be sold for the payment of her debts; gave a hundred pounds legacy to her grandson, who was her heir at law; and directed that the surplus should be paid to her granddaughter, at her age of twenty-one or marriage, provided she married with the consent of the two popish trustees, the protestant trustee being to be unconcerned in that affair. Having made this will, she died in *July* 1716. In *August* 1717 the granddaughter married a protestant, by the consent of the popish trustees. At the time of the death of the grandmother, the grandson was but nine years of age, and educated in the *Roman* catholic religion. The granddaughter, at the time of her marriage, was fifteen, and likewise educated a papist, and professed that religion at the time of making the will, and of the death of the grandmother, and at the time of the marriage. Both grandson and granddaughter have since conformed, taking the oaths, &c. before they came to the age of eighteen.

It was the persuasion of witnesses examined in the cause, that the true motive that prevailed with the grandmother to disinherit her grandson, her heir at law, and give her estate to the granddaughter, was, that the grandson being but nine years of age, she did not know but he might easily be brought up a protestant; but the [482] * granddaughter being fourteen years of age, and so better grounded in her principles, she hoped would firmly adhere to the *Roman* catholic religion.

Though the popish trustees consented to the match, and that with a protestant, yet nothing was settled upon the wife but barely her own fortune; and that too subject to a power of revocation by the husband and the popish trustees.

The question now before the Court was, Whether this devise to the granddaughter was not void by the 11. & 12. *Will.* 3. c. . and so the grandson intitled to have the trust of the residue, decreed to descend on him, as heir at law, and having taken the oaths, &c. as that act requires, within six months after the age of eighteen?

This point depends upon two clauses in that act. The first clause enacts, "That from and after the twenty ninth of *September* 1700, if any person educated in the popish religion, or professing the same, shall not, within six months after attaining the age of eighteen, take the oaths, &c. such person shall, in respect of himself only, but not in respect of his heirs or posterity, be disabled and made incapable to inherit or take by descent, devise, or limitation, in possession, reversion, or remainder, any lands, tenements, or hereditaments: and that during the life of such "person,

"person, or until he or she shall take the said oaths, &c. the next "of his or her kindred, which shall be a protestant, shall have "and enjoy the said lands, &c. without being accountable for the "profits." HILL against FILKING AND HIS WIFE.

The second clause enacts, "That from and after the tenth of "*April* 1700, every papist, or person making profession of the "popish religion, shall be disabled and made incapable to purchase "either in his or her own name, or in the name of any other per-"son or persons to his or her use, or in trust for him or her, any "manors, lands, profits out of lands, tenements, rents, terms, or "hereditaments, &c."

* IT WAS ARGUED *for the grandson*, the heir at law, that it cannot be disputed since the case of *Roper v. Radcliff* (a), that though the estate be devised to be sold for the payment of debts, yet as to the *residuum*, it must be considered as a devise of land. It must likewise be admitted since that case, that the word "pur-"chase" in the second clause does include devises, and all manner of ways of coming to estates in opposition to descent; and consequently, that if the granddaughter be a person that falls under the second clause, this devise to her would be void. As to the description of the persons to which the word "purchase" in the second clause does relate, it is only a papist, and one professing the popish religion. And certainly the granddaughter, who is proved to have been educated in, and to have professed the popish religion at the time when the will was made, when the testatrix died (the time when the right to the *residuum* vested, though it was to take effect *in futuro*, viz. at the age of twenty-one or marriage), nay at the time of the marriage, and so zealous in her religion as to declare she would be torn to pieces by wild horses before she would turn *heretic*, must be esteemed one that comes within the description in the act, "a papist, or person making profession of the popish "religion." And though she has since conformed, yet since she did not do so at the time when the testatrix died, the time when her interest vested, the subsequent conformity will not replace that interest which is now vested in another. All this is so plain, that it could not in the least be controverted, were the question singly to be determined upon this clause. But it may be objected, that there is another clause in this act, and care must be taken that such an interpretation be put upon both these clauses as to make them consist with one another, which I own must be done; but the * putting of this construction upon the second clause will not contradict anything enacted by the first. For whoever considers the act well will find, that the law-makers intended, by the first clause, to have regard to the estates that then were in being. And as to these it is plain, that the act never intended to break in upon, or interrupt the course of, the descent; but only to create a temporary incapacity or disability of taking the profits, removeable * [483] * [484]

(a) Ante, 93. 234.

by

HILL *against* FILKING AND HIS WIFE.

by conformity before such an age. And though the word "devise" be in that clause, yet it must be understood of such devises as are designed to prevent the descent; and consequently must relate to such devisees who, being heirs at law, would have taken by descent had it not been devised to them. And had they not done this, they had done nothing; for the act might have been evaded with all the ease imaginable. As by the former clause the statute provides for estates then subsisting, by the second it intended to provide against all new acquisitions by persons professing the *Roman* catholic religion. And here the legislators thought it reasonable to provide against this, not by creating, as in the former, a temporary incapacity, removeable by conformity, but a total and absolute incapacity to take at all. As the granddaughter appears thus plainly to have been within the description of the last clause, so it is no less plain, that the grandson, being heir at law, has, by his conformity within the time prescribed by the act, in the first clause of it, put himself in a capacity of taking by descent, as heir at law.

IT WAS ARGUED *in favour of the granddaughter*, that the great design of this act of parliament was to encourage *Roman catholics* to turn *protestants*, by making it their interest so to do: whereas this interpretation would be a great discouragement; since by turning they were to receive no advantage. And therefore it was
* [485] * insisted, that since this last clause was in that respect more severe, and created a total incapacity, without restoring them upon their conformity, it should not be extended to any that could possibly come within the former; and that therefore, as the first clause respected persons under the age of eighteen, so none should be deemed persons professing the popish religion within the second clause, but such as were above that age at the time of the purchase: and that the first clause may extend to the granddaughter is plain, the words being "to take by descent, limitation, or devise."

PARKER, *Lord Chancellor*. The grandson seems to me to have a strong case. It is admitted, that the granddaughter is within the express words of the second clause; she being proved to be a person professing the popish religion at the time of the making the will, and of the death of her grandmother, and of her marriage. But it is said, that this second clause must, as to the persons to whom it is to relate, be restrained by the first, so as not to extend to any comprehended in that clause; for otherwise, as the disabilities created by these two clauses are different in their nature, the one part of the act would contradict the other. The meaning of the first clause in this act has been very much mistaken. It has been imagined, that this clause has relation to the age of the person at the time of the descent; whereas the act says nothing at all to that matter. For it is plain from the act, that the age of the person has relation entirely to the time of taking the oaths, &c. not of the descent: and therefore though, when the infant comes to the age of eighteen, the descent has not happened, yet then it is that the

time

time prescribed by the act for qualifying, &c. commences, in order to become capable of what may hereafter descend to him. In case he slips this time, and * the land descends afterwards, the incapacity by the act takes place; nor is this any hardship, since he had it in his power, by a timely conformity, to have been capable of taking it. The first clause in this act of parliament has respect to old subsisting estates; but whereas the law-makers plainly foresaw, that if they should only use the word "descend," the act would signify just nothing; therefore the words "limitation and devise" were added; the first to comprehend all those estates where the present possessor being only tenant for life, the son in remainder was to take by limitation; the other of devise, to prevent the interrupting the descent, and so evading the act, by devising to the heir at law. The second clause has relation to estates to be created *in futuro*. And as to these estates, the legislators thought it reasonable to create not a temporal incapacity, removeable upon conformity by a certain age, but a total and absolute disability to take at all. From this view of the act of parliament it appears, that the words in the first clause, "devise and limitation," have a proper use and signification, without breaking in upon the second clause; for they extend to all such devises and limitations as are not made void by the second clause, of which many instances could be given. And thus it appears, that the second clause, being entirely distinct from the first, the age of eighteen is entirely immaterial. Even in the opinion of the Counsel for the granddaughter, the legislators did not think proper to lay persons over the age of eighteen, and professing the popish religion, under the temptation of turning protestants by giving them their estates upon conformity; and therefore the argument drawn by the Counsel for the granddaughter, from the intention of the legislators to encourage papists to turn protestants, by giving them their estates again, is of no force; for in the first * clause it was their intention, but in the second most evidently it was not. The only remaining question will be, to fix the time when a person may be said to profess the popish religion; and this indeed will be extremely difficult, and perhaps impossible, upon account of the difference of capacity, education, &c. I can be sure, that at one, two, or three years of age, a person cannot be said to profess any religion at all, and consequently not the *Roman*; so at eighteen and before I can be sure, that persons may profess the religion they are of, and consequently the *Roman*. This the makers of the act plainly supposed, when they enacted, "That if "any person professing, &c. shall not, within six months after "attaining the age of eighteen, &c." But for the exact bounds, it is impossible to fix them; and they must therefore be left to the discretion of the Judges, who will be very indulgent in this matter. The case is a new one; and therefore I will have the assistance of the Judges. *[487]

But

MILL against FILKINS AND HIS WIFE.

But his lordship directed some issues at law, to bring the case more fully before the Court (a).

(a) This case came on again in the month of *June* 1725, upon the amended bill, before KING, *Lord Chancellor*, who decreed, contrary to the opinion of LORD MACCLESFIELD, in favour of the defendant.—See S. C. post. 536. 2. Peer. Wms. 13. *notis.*

Case 226.

Mills *against* Eden.

Care of court of equity to see debts of the testator paid.

S. C. 2. Eq. Abr. 251.

EDEN being indebted to *Mills* in the sum of five hundred pounds, for his better security confessed a judgment to him. In the month of *July* 1712, *Eden* made his will, and devised his land to trustees to be sold for the payment of debts, and died. The trustees being dead, or refusing to act, administration with the will annexed was granted to * the plaintiff *Mills*, as being the
* [488] largest creditor, and that by judgment. *Mills* brought this bill against the widow, and others of his creditors, to have an account of the estate, discover incumbrances, &c.

What was special in the case was this:

Eden made a settlement upon his wife after marriage, of the lands that were then his father's, in bar of dower and thirds; his father joining with him. The uses in the settlement were to the use of his father for his life, then of the mother for her life, remainder to the use of *Eden* for his life, remainder to *Mary Eden* his then wife (the defendant) for her life, for her jointure in bar of her dower, thirds, &c. remainder, &c.

The father was alive at the time when the defendant *Eden* put in her answer, but died before the hearing of the cause. She by her answer waived this settlement, as being made after marriage, and not to take effect, in the original creation of it, immediately upon the death of her husband, as the statute about jointures requires; for the father might outlive the husband, and in fact did so, and so might the mother; and though they are since dead, yet that will not make the jointure more binding.

She therefore insisted upon having her dower.

But THE LORD CHANCELLOR seeing in the case, that if she waived this settlement, these lands would go to the heir at law, not subject to the payment of any debts, since it was never part of the testator's estate, the father outliving him; and that if she was to have her dower, there would not be assets to pay (as the Counsel said) five shillings in the pound; and so that the wife did this, in favour of the heir at law, to the prejudice of the creditors;
*[489] * HE DECREED, that she should take this estate for her life, under this settlement; but that she should assign it over in trust for the creditors, who should convey to her a third of the land of her husband for her dower, free from incumbrances. He said, that this

was

was no more than what was agreeable with what the Court does in other cases; as in decreeing a judgment-creditor, who has his election at law to resort for his satisfaction to either real or personal estate, to make such an election as simple-contract creditors may not be defrauded (a).

Miller against Ebry.

(a) See Sagittary v. Hyde, 2. Vern. 455. Forey v. Marsh, 2. Vern. 182. Lannoy v. Duke of Athol, 2. Atk. 466. 2. Fontblanque's Equity, 302.

Cock *against* Goodfellow.

Case 227.

WALTER COCK devises by his will one-third of his personal estate to his wife, the other two-thirds to be equally divided among his children, with the advantage of survivorship, in case any of them died before they came of age. He made several, and among the rest his wife, guardians of his children. He directed, that the estate of the children should be placed out to interest, or other way of improvement, by the consent of the majority of the guardians; and he further directed, that his wife should have the advantage of the improvement of two-thirds of the estate of the children, without any account, for their maintenance; and that the interest of the other third should go towards the increase of their fortunes. He makes his wife executrix, and dies in *August* 1712, leaving behind him a very considerable estate, both in money and the stocks.

A deed made by a trader two months before an act of bankruptcy committed, for securing the fortunes of children out of trust-monies in his hand, is good against the creditors.

S. C. 2. Eq. Abr. 100.

His wife proves the will, and takes possession of the estate.

In *May* 1714, *Peter Vandermash*, one of the wife's brothers, died, and left in money to the children about * five and twenty hundred pounds, which money came into the hands of their mother. * [490]

It was proved by the book-keeper, that immediately upon the death of the father, an account of the whole estate was taken, and an exact estimation made of what each child's share came to; and that the accounts of every child, with the interest and income belonging to his fortune, were, with great exactness, kept separate and distinct until the year 1719, when, upon casting up the accounts, the whole estate belonging to the children was found to amount to about four and twenty thousand pounds.

In *May* 1720, *Mrs. Cock*, the mother, treated of a match for her eldest son with a daughter of *Lord Trevor*; and by marriage-articles it was agreed, that five thousand pounds should be paid by the mother, *Mrs. Cock*, and five thousand pounds by *Lord Trevor*, into the hands of trustees, to be laid out in land, and settled in the usual way of marriage-settlements. *Mrs. Cock* covenanted besides, that she would purchase a hundred pounds a-year, and settle it to the same uses as the former, except the jointure.

About this time *Mrs. Cock* lays out about ten thousand seven hundred pounds in a purchase of land of one *Scot*.

Mrs.

Cock against Goodfellow.

Mrs. Cock all this time carried on a very great trade. In October 1720, her brother *Vandermash*, in *Holland*, sent her word, that though he had in effects more than enough to answer all demands, yet so great was the run upon him, occasioned by the sudden fall of credit in *Holland*, that unless she would supply him immediately with money and credit to the amount of forty thousand pounds, he could not stand it.

Mrs. Cock complied with his desire; but at the same time, *viz.* the nineteenth of *October* 1720, she makes a deed, wherein, taking notice of the will of her husband, and what was left thereby to her children, and of the will of the uncle, and what he left them, and of the sum that appeared due to the children upon an account taken in the year 1719, and of the marriage-articles of her son, by which
* [491] five thousand pounds was to have been paid to * trustees for, &c. and a hundred pounds a-year purchased, &c. she covenants that, for the better securing what thus appeared to be due to her children, she would immediately transfer to trustees, &c. all that she had in the several funds; and whereas the books of the *South-Sea Company* were then shut, she declares, that as to the *South-Sea* stock, she was but a nominal trustee for her children, the stock having been bought with their money; and that as soon as the books were open, she would transfer, &c. And in the same deed, the estate that she had for her life was conveyed to the trustees for ninety-nine years, if she should live so long, as a further security for her children: the estate likewise purchased by her of *Scot*, with a view, as she said, to have made good the marriage-articles of her son, was conveyed to trustees for that purpose. The trustees (the children's demand satisfied) were to stand seised of the surplus to the use of the mother. All the stocks that were transferrable were transferred next day.

The sixth of *December*, *Mrs. Cock* became a bankrupt; the children of *Mrs. Cock* bring their bill to have this deed established, and to have the preference of *Mrs. Cock's* creditors.

It was argued *in favour of the children*, that this deed being made two months before any act of bankruptcy, and for securing that to which the children had a just demand, was a good deed. It was said, if the specific assets of her husband and brother had remained in her hands, unblended and unmixed with her own, and then this misfortune had befallen her, there could have been no question, Whether the children's estate could be subject to the mother's debts? and therefore the question can only arise from the mother's having blended and mixed those assets belonging to her
* [492] children with her own estate and trade. * And since this was an act that it was impossible for the children to prevent, and from whence they could not receive the least possibility of advantage, but might be very great sufferers, the mother, if she has been guilty of it, has broken the trust reposed in her. Now if the mother, being sensible of this, has by this deed endeavoured, as in justice and conscience

conscience she ought, to prevent any inconvenience they might otherwise have been liable to, from that wrong she had done them, in mixing their estate with hers, this, as it is an act of justice to her children, will be always favoured in this court. It would be very strange to say, that if *Mrs. Cock* has been guilty of a breach of trust, the assignees, who stand in her place, shall take advantage of it, when she herself could not; and that in consequence of this, the estate of the children shall be vested in the assignees for their advantage. This deed has done no more for the children than possibly what, by a bill brought in this court, she might have been compelled to. The case of *Taylor v. Wheeler* (a) was quoted, as a strong case in favour of the children. There a copyholder in fee surrendered to the use of the mortgagee in fee; but before the presentment of the surrender became a bankrupt. LORD COWPER, upon the question brought before him, Whether the assignees of the commissioners of bankruptcy should be preferred, or the mortgagee? decreed in favour of the mortgagee; because the assignees ought not to be in a better case than the bankrupt, who was bound in equity by this defective conveyance. So in the same manner as to the stock transferred, *Mrs. Cock* being bound in law and equity; and as to that untransferred, in equity, the assignees who stand in her place must be so too.

COCK *against* GOODFELLOW.

2. Vern 564. Salk. 449. Mortgagee or purchaser precedent, though by defective conveyance, preferred before the assignees of the commissioners of bankruptcy.

* ARGUMENT *in favour of the assignees.* As to the accounts that were said to be kept separate and distinct; it was said, that as these accounts were not binding on one hand with respect to the children, so on the other hand they ought not to prejudice the creditors. These accounts were kept merely for the mother's satisfaction, and were entirely under her power. No part of the estate whatever specificated by them to the children; and therefore they are not in the case. Then it was argued, that the deed was void from the time, nature, and end of it. As to the time; it was made but two months before an actual bankruptcy, which in all probability she then foresaw. As to the nature of the deed; there is in it *suggestio falsi*; for that part of it wherein she says, that the stock was bought with her children's money, is entirely false; nor is the price mentioned at which the stock is bought. So likewise what she says, that she is but a nominal trustee for them, is all false; for it does not at all appear, that this part of the estate, consisting in the stocks, was anyways appropriated to the children before this deed. Another badge of fraud in this deed is, that she plainly appears to be putting every-thing out of her own power, and covering every-thing by it; for her estate for life in land is by it vested in trustees, as a further security for the children. As to the end of the deed; it is to give an undue preference to her children, who must be acknowledged to be creditors. And as far as the preference is undue, *pro tanto* it is to defraud the rest of the creditors. And then this deed itself amounts to an act of bankruptcy; for it falls directly within the description of 1. *Jac.* 1. c. 15. of a [493]

(a) 1 Eq. Abr. 122. 312. 2. Vern. 564. 2. Salk. 449.

Cock *against* Goodfellow. * fraudulent deed, made on purpose to defeat or delay creditors. Besides, this deed is plainly a voluntary one; for she was at a perfect liberty whether she would or would not make it. And it is made to prevent that equality which in a court of equity is always accounted the greatest equity. As to the stock untransferred; it was said, that the assignees were within the common rule of equity; that having law and equity of their side, they ought to prevail against the children, who had an equitable right only. Ante, 492. As to the case of *Taylor v. Wheeler (a)*; it was said, that case differed from this. For first, there the money was lent upon that very security of the copyhold land; and there being an inchoation of a legal estate, complete *quoad* the mortgagor or surrenderor, there was, as Lord Cowper observed, a lien upon the land, and the mortgagee might have compelled a specific performance; which in the nature of the thing is impossible here, one hundred pounds stock being as good as another. And secondly, it did not appear, that the surrender was made upon a view of his becoming a bankrupt. As children will reap the greatest advantage from their parents undertakings, so it is reasonable that they should, at least as much as creditors, share in the misfortunes of their parents.

It was replied *in favour of the children*, that no deed could be a fraudulent deed, so as to amount to an act of bankruptcy within the statute 3. *Jac.* 1. c. 15. but what would be esteemed fraudulent against a purchaser, by 27. *Eliz.* c. 4. which it can never be said that this is. The deed in the statute 3. *Jac.* 1. c. 15. is supposed to be a deed of trust for the advantage of the bankrupt, * [495] and to avoid * the payment of debts; but this is a deed in trust for creditors, and for the payment of debts. Nor will the preference created by this deed make it fraudulent. For an executor may by law, among debts equal in their nature, give a preference to which he pleases; nay, by confessing judgment to a creditor by simple contract, he may give him a preference to creditors of a superior nature. Every man by paying a debt, when he owes others, gives that creditor a preference. If paying of the children, if they had been of age to receive it, had been lawful for the mother, as most certainly it had, the giving security for the doing of it must be lawful too. She was so far from being a bankrupt at the execution of this deed, that it is plain she did not think of becoming one at the time; for if she had, she never would have sent her forty thousand pounds to have supported her brother's credit. The case of *Taylor v. Wheeler*, reported by *Salkeld* (*a*), is a strong case; for there the mortgagee had no more estate in law in the land than the children have here in the stocks untransferred. Articles of agreement for a jointure have been held good against assignees, though legal estate in them.

Parker, *Lord Chancellor*, after giving a narrative of the state of the case, observed, that the clause of the will that directs the

(*a*) Salk. 449.

children's

children's fortunes to be placed out by *Mrs. Cock*, with the consent of the major part of the guardians, to interest, or other way of improvement, must be understood exclusive of trade; so that it was plainly never the intention of the father, that the fortunes of the children should be hazarded in the way of trade. He observed further, that whoever traded with her knew that she had but one-third of her husband's estate; and therefore gave her credit upon account of * that third only. And for her to have hazarded the fortunes of her children in trade had been a plain breach of trust in her. He took notice, that upon the death of the father there was a great part of his estate in the public funds; and that in the year 1720 she had a great deal of money in the funds, which as to a great part of it might be the very original stock of her husband, or at least stock replaced in the room of it. It is plain, that as her ruin was owing to the bankruptcy of her brother, she hoped this might have been prevented by the speedy supply of forty thousand pounds, which she sent him at this time. If she had not thought this, it was directly flinging away so much money. So that this deed cannot be said to have been made upon a certain view of her becoming a bankrupt. Fears, indeed, she could not but have; she might think, that though her brother did assure her that this supply would support his credit, yet possibly it might not. And therefore at a time when she was striking this bold stroke to save her brother, it was but just and prudent for her to resolve in all events to secure what was due from her to her children. The objection against this deed, that it is a fraudulent one, and within the statute of 1. *Jac.* 1. c. 15. because made so near the act of bankruptcy, is a very frivolous one; for the deeds meant by that statute are deeds made to defraud creditors, whereas this is a deed made to secure a just debt. But it is objected, that this deed is made to give an undue preference to her children. I know not what law or reason there is to favour this objection. Anybody may make his creditor executor, and then the law gives him a preference; and not only so, but the law allows this executor to give any other creditor, in equal degree, a preference. It is true indeed, sometimes this Court will interpose, because these powers may be an inlet to fraud; but this Court * will never take from the executor himself this preference the law gives him. Is not paying of a debt giving that creditor as great a preference as giving security? And yet it was never pretended, that paying of a debt should be held an act of bankruptcy, because but two months before the bankruptcy. But it is said, that this is done for children; and they are the fittest persons to suffer in their parents misfortunes. Case of children is always favoured in a court of equity; they are esteemed as creditors of the parents by nature. If a man by his will give copyhold lands to his younger children, the Court will compel the heir at law to surrender to them. Very strange doctrine, that the plaintiffs, because creditors by nature as well as justice, should be in a worse condition than other creditors. Very strange, that it should be esteemed a fraud in a parent

Cock *against* Goodfellow.

* [496]

Stat. 1. *Jac.* 1. cap. 15.

2. Fonblanque's Equity, 414.

* [497]

Cock *against* Goodfellow. parent to follow the voice of nature; especially when in doing this, she does but what duty and justice require from her, as their guardian and trustee. If the mother had been going to sea, and had made this provision for her children's security, the very same objections might have been made. A man who knows he must be a bankrupt may by law pay off any of his creditors. And this power, as it may be abused, so, on the other hand, may be very properly executed; there may be particular obligations in point of gratitude, &c. Assignees can take nothing but what the commissioners can assign; and the commissioners can assign nothing but what the bankrupt could honestly assign to them. If *Mrs. Cock* had transferred (subsequent to the deed) this stock, for a valuable consideration, to persons without notice, it had been a valid but knavish act. The cases of an * [498] agreement to transfer stock, the transfer wanting, or agreement to surrender copyhold, the surrender wanting, are both alike; and therefore, as the Court will compel a surrender, so it will a transfer. He said, that a purchaser's being decreed to hold the land against a judgment, confessed between the time of articles and the conveyance, was a very strong case for the plaintiffs. He called the deed an honourable deed; and established it throughout.

TRINITY

TRINITY TERM,

The Eighth of George the First,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joseph Jekyll, *Knt. Master of the Rolls.*

Le Croy *against* Eastman.

Case 228.

LE CROY bought nine hundred and ninety pounds *South-Sea* stock of *Le Grand*; but not caring to have this stock in his own name, it was at his desire transferred to the defendant; from whom the plaintiff took a note, declaring that he was a trustee of this stock for the plaintiff; and that he would be accountable to him for the stock and produce. Afterwards when the stock was sold for about six hundred *per * cent.* the plaintiff desired that the defendant would transfer the nine hundred and ninety pounds stock to him: The defendant accordingly transferred five hundred pounds of this stock, and told the plaintiff that it would be inconvenient to him at that time to transfer more, but that it was all one, for he would be accountable for the stock; and advised the plaintiff as a friend, not to part with that five hundred pounds stock, which he had transferred to him, for he was very sure stock would rise very considerably; which advice the plaintiff admits he so far followed, as that the five hundred pounds was still unsold, believing the defendant to have a greater insight into these matters than himself. Upon the fall of the stock, the plaintiff brings his bill against the defendant, praying that he might account for the four hundred and ninety pounds stock at the price the stock then went, *viz.* six hundred pounds, insisting that when the defendant told the plaintiff, that he would be accountable for the stock, he understood him to mean at the price the stock then went.

The question was, whether a trustee of *South-Sea* stock should answer the value of the stock when sold by him; or only be accountable for stock and dividends? Resolved in favour of the trustee, upon the circumstances of the case.

S. C. 2. Eq. Abr. 6.

It appeared by the defendant's answer, that the defendant had, some time after he was a trustee, mortgaged a thousand pounds stock to the *South-Sea* Company for four thousand pounds, and

that

Le Croy *against* Eastman.

that afterwards the defendant sold out all the stock he had in his own name, except eighty pounds, but that he had more than stock enough in another person's name to have answered the trust, if the plaintiff had insisted upon a transfer. And he now offered to transfer to the plaintiff the four hundred and ninety pounds stock and produce.

Parker, *Lord Chancellor*. It is not material to prove at what rate the defendant sold the stock, for the sale was at his own risk. If the stock had rose, he would still have been accountable for the stock, not the money; and therefore as he must have stood to the loss in case of the rise of stock, it is reasonable he should reap the advantage upon a fall. Indeed, if the plaintiff has sustained any loss, by the trustees meddling with the trust stock, he ought to
[500] have a satisfaction for it: but nothing of this appears; * on the contrary he, believing the stock would still rise, has the five hundred pounds stock actually transferred by him unsold to this day; as probably for the same reason, he would have had the four hundred and ninety pound stock still by him, in case that likewise had been transferred to him. It is extremely hard to conceive, that when the defendant told him he would be accountable for the stock, he should understand him of the money arising from the sale of the stock; when it is plain, he took the defendant's advice of not selling, and believed the stock would rise; and therefore would naturally desire, as in reason he might, that the defendant would be accountable for the stock. I take it to be very plain, that the defendant has not sold, but mortgaged the trust stock. For since there is no specificating one hundred pound *South-Sea* stock from another, a court of equity will never adjudge a man to have broken his trust in a higher degree, when he may with equal reason be adjudged to have done it in a lower; and therefore the stock mortgaged must be esteemed the stock of the plaintiff, the stock sold that of the defendant. The defendant must only account for the stock and produce. Let both sides bear their own costs. In case the defendant had failed, and the stock been worth redeeming, he thought the plaintiff would have had a clear title to redeem; but then the Company must have had notice of the trust.

*[501]

Case 229.

Gore *against* Gore.

A devise to trustees and their heirs for a term of five hundred years, for the payment of an annuity to his eldest son for life, with remainder from and after the determination of the term, to the use of the first son of the body of such eldest son to be begotten, &c. and for default of such issue, remainder over in fee; the remainder is good by way of *executory devise*.—S. C. 9. Mod. 5. S. C. 2. Peer Wms. 28. S. C. 2. Eq. Abr. 339. S. C. 2. Bar. 209. 229. 355 S. C. 2. Stra. 958.

William Gore had issue *Thomas* and *Edward*, and being seised in fee of certain lands; he devised his lands to two trustees and their heirs for the term of five hundred years, for the payment of fifty pounds a-year to the eldest son during his life, the remainder from and after the determination of the said term, to the use and behoof of the first son of the body of the said *Thomas* his eldest son to be begotten, and the heirs males of the body of the first son;

remainder

remainder to the second, third, and so on to the tenth son over in tail; and for default of such issue, remainder to *Edward* his second son. Gore *against* Gore.

N. B. When the testator died, his eldest son *Thomas* had no issue; but since his death had issue a daughter, and very likely to have more children.

PARKER, *Lord Chancellor*, made a case of it, and sent it to the Judges of the king's bench for their opinion. The Judges certified their opinion to be, "that the devise to the first son of "*Thomas Gore* was void; for it could not take effect as a remainder, because there was no freehold to support it; nor by way of "executory devise, because it was not to take place within that "compass of time the law allows for that purpose. They de"clared likewise their opinion to be, that the remainder to the "second son was vested in him on the death of the testator."

When the cause, upon the certificate of the Judges, came back into chancery for the direction of the Court,

SIR ROBERT RAYMOND, *Attorney-General*, was going to argue against the opinion of the Judges; but was * stopped by * [502]

THE LORD CHANCELLOR, who told him, that he thought he must be concluded by the opinion of the Judges. He admitted, that in case he had sent for the Judges to have assisted him in the hearing of the cause, and the reason of the Judges had not convinced him, he must have acted according to his own understanding, for it was to be his decree, not theirs (and this LORD NOTTINGHAM did in the case of the *Duke of Norfolk*), but that here he was not at that liberty; having not heard the arguments at law before the Judges, nor been acquainted with the grounds on which their opinion was founded; and that he looked upon the Judges here in the nature of referrees.

THE LORD CHANCELLOR, upon further debate of the case, said it was as undoubtedly the intention of the testator, that the issue of the eldest son should not be disinherited, as it was that the eldest son should: That the intention of the testator, if it could possibly, by rules of law, ought to be supported, being a very reasonable one; and that Judges have been commended for being *astuti* in doing this.

Upon this it was said, if the son of the eldest son should take when born, it must be by way of executory devise; and then the consequence must be, that the eldest son would take until a son was born; whereas the testator plainly intended him nothing.

LORD CHANCELLOR. I do not know, whether this be a necessary consequence. And whether I cannot take a middle way, and as there is a precedent term, decree that after debts paid, the trustees shall be accountable to the after-born son for the profits.

 Let

GORE *against* GORE.

Let it ſtand over.

Afterwards the parties agreed before anything more was done in it (*a*).

(*a*) But afterwards the ſon of *Thomas Gore* brought this matter again into Chancery, and KING, *Lord Chancellor*, ſent it a ſecond time to the king's bench, where HARDWICKE, *Chief Juſtice*, PAGE, PROBYN, and LEE, *Juſtices*, were of opinion againſt the opinion of their predeceſſors, that this was a good executory deviſe, and not too remote; for that it muſt in all events, one way or other, happen upon the death of *Thomas Gore*, whether he ſhould have a ſon or not, and either upon the birth of the ſon, or upon his death without iſſue male, the freehold muſt veſt; and accordingly they certified, "that the deviſe of the manors of "*Barrow* and *Southby* to the firſt ſon of "*Thomas Gore*, is good by way of execu- "tory deviſe, and that the freehold of the "ſaid manors, at the death of the de- "viſor, veſted in his heir at law."— S. C. 2. Peer Wms. 64. S. C. 2. Stra. 958.

* [503]

Caſe 230.

* Lewis *againſt* Lord Lechmere.

Bill for ſpecific performance of articles for the purchaſe of an eſtate, diſmiſſed with coſts; becauſe the title was not laid before the vendee's Counſel within the time limited.

S. C. 2. Eq. Abr. 20. 689.

THIS was a bill brought by the plaintiff for a ſpecific performance of articles, bearing date the thirtieth day of *Auguſt* 1720, whereby *Lord Lechmere* had covenanted to purchaſe ſuch an eſtate at forty years purchaſe; provided the plaintiff did, on or before the tenth day of *November* following, lay ſuch an abſtract of the title before *Lord Lechmere's* Counſel, as they ſhould approve.

The bill was diſmiſſed with coſts; becauſe the plaintiff had not laid his title before *Lord Lechmere's* Counſel within the time limited by the articles; which time, THE LORD CHANCELLOR was pleaſed to ſay, was very material; the price of *South-Sea* ſtock, from whence the money for the purchaſe was to be raiſed, being upon the tenth of *November* two hundred and ſixty *per cent.* and at the time of the hearing the cauſe, but ninety-two *per cent.*

Though this was that, upon which THE CHANCELLOR was pleaſed to found his decree; yet there were ſeveral other things in the cauſe.

Whether it be conſiſtent with the rules of equity to decree a performance in ſpecie of ſo extravagant and unreaſonable a bargain as a ſale of land at forty years purchaſe? This point not determined here, but ſee 2. Vern. 423.

IT WAS INSISTED *for the defendant*, that the greatneſs of the price, double the value of the land, was reaſon enough for a court of equity not to interpoſe, ſo as to inforce a ſpecific performance; that being intirely a diſcretionary power, and what the Court *ex debito juſtitiæ* is not bound to do. It was acknowledged, that no decree had been made purely upon this point; but it was ſaid, there were ſeveral caſes where this circumſtance had great weight with the Court. In the caſe of *Hanger v. Fyles* (*a*) of the laſt Term, where the vendor brought his bill for the money, though the decree was founded upon the vendor's not being * able to convey a manor, according to his covenant; yet it being acknowledged, that this manor was of little or no value, it is evident, that

* [504]

(*a*) 2. Eq. Abr. 20. 689.

the

Lewis against Lord Lechmere.

the other circumstance in the cause, the unreasonableness of the price, was that which really inclined the Court to lay hold upon a point, too inconsiderable otherwise to have been taken notice of. In the case likewise of *Hicks v. Philips (a)* of the last Term, which was a bill brought by the vendor for a specific performance of articles, the bill was dismissed; because the vendor had covenanted to convey freehold, and one acre or two proved copyhold; even though the vendor offered to procure an enfranchisement of this land, or make any compensation in the price; which shews the regard had by the Court to this other circumstance attending the case, *viz.* the unreasonableness of the price.

As to this point *it was answered by* THE COUNSEL *for the plaintiff*, that if a court of equity were to set aside agreements upon this account, it would make all transactions precarious and uncertain, and invest a court of equity with a very arbitrary power; the value of money and land being always various and uncertain. That if any measure was to be laid down in this case, the point to be considered must be, whether the contract was an unreasonable one at the time it was made. And accordingly upon this ground, it was lately determined in the court of exchequer, in this case of *Keen v. Stuckley (b)*, that they would inforce a specific performance of these contracts, if the price was reasonable at the time the contract was made, how disproportionable soever after accidents might make it.

IT WAS INSISTED *by the Counsel for the plaintiff*, that the clause making void the articles, in case the plaintiff did not, by such a time, lay such an abstract of * the title before the Counsel of the defendant as they should approve, had been obtained by fraud and surprize, and was an unreasonable clause. As to the fraud and surprize, they failed in their proof; but insisted upon the unreasonableness of it; because though the title was never so clear and good, yet if the Counsel of the defendant should disapprove of it, or give no opinion of it at all, the articles must be void. * [505]

BUT TO THIS *it was answered*, that the meaning of this clause was no more than that the plaintiff should make out a good title; for if the Counsel should be supposed to act unreasonably, and to disapprove of a good and clear title (such a title as a court of law or equity would take to be a good title) yet the defendant would be bound, notwithstanding the disapprobation of his Counsel.

IT WAS SAID *by the Counsel for the defendant*, that though in case of articles entered into for the purchase of lands, the vendee

Not the same reason for admitting the vendor to come into equity for a specific performance, as there is for the vendee; since the one comes there to obtain that for which he has no remedy at law, *viz.* the land; but the other wants nothing but the money, which he may recover at law in damages But this was determined in favour of the vendor; because upon mutual covenants there ought to be mutual remedies.

(*a*) Prec. Ch. 575. 2. Eq. Abr. 18. 688.

(*b*) But this decree of the court of exchequer was reversed in the house of lords, Gilb. E. R. 155.—NOTE *to former edition.*

may

Lewis *against* Lord Lechmere.

may undoubtedly exhibit his bill in equity for the specific performance of these articles; yet it might admit of a doubt, whether the vendor might do the same. As to the vendee, though he has an action at law upon the articles, yet that sounds only in damages; and therefore he may come into equity for the land, which on several accounts may possibly be more desirable to him than any pecuniary compensation. But for the vendor, he only desires to have the money; and that, whether it be recovered at law in damages, or in equity, is but money still. * If it be said, that at law the jury may at their own liberty and discretion, give him what damages they upon all the circumstances of the case think reasonable; whereas upon a bill in equity, your lordship has no power to vary from the sum contracted for in the articles, be the circumstances of the case what they will; this seems to be a very odd reason for coming into a court of equity, and the reverse of what generally intitles people to relief in equity.

* [506]

But to this *it was answered*, that upon mutual articles there ought to be mutual remedies: that if the vendee had a remedy both in law and equity, the vendor would not be upon a par with him, unless he had so too: that the remedy the vendor had at law, was not a remedy adequate to what he had in this court; for at law they only could give him the difference in damages, whereas he might for particular reasons stand in need of the whole sum. Besides, by the articles the land is bound, and the vendor is in nature of a trustee for the vendee; and whether a recovery in an action of law upon the articles, may make him cease to be so, is not entirely clear.

The Lord Chancellor was of opinion, that the remedy the vendor had at law upon the articles was not adequate to that of a bill in equity for a specific performance.

However he dismissed the bill, upon the point above mentioned at the beginning of the case.

MICHAELMAS TERM,

The Ninth of George the First,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joseph Jekyll, *Knt. Master of the Rolls.*

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* [507]

Case 231.

* Hobson and his Wife *against* Trevor.

Bill for specific performance.

THIS was a bill brought for the specific performance of an agreement, made upon the marriage of the defendant's daughter with the plaintiff.

The case was this:

T. in consideration of *H.*'s marrying his daughter, enters into a bond to *H.* to settle, &c. one third of whatever estate should come to him upon the death of his father. Decreed that the condition of this bond should be specifically performed; for the design of the agreement of which this bond was an evidence, being to make lasting provision for wife and children, could never be satisfied by the forfeiture of the penalty, which would be all the husband's.—S. C. 1. Stra. 533. S. C. 2. Eq. Abr. 21. S. C. 2. Peer Wms. 191.

Trevor gave encouragement to the plaintiff, a young gentleman under age, son of *Sir Charles Hobson*, esteemed a man of very good substance, to make address to his daughter; and promised him, in case he would marry her, that he would settle upon him and his daughter, the third of whatever estate should come to him, upon the death of his father the *Master of the Rolls*; and did accordingly enter into a bond to him, before the marriage, in the penalty of five thousand pounds, whereof the condition was to this effect: "WHEREAS it is agreed between the defendant and the plaintiff, "that in case a marriage intended to be had between the defen- "dant's daughter and the plaintiff take effect, the defendant should "within three months after the death of his father, settle one third "of whatever estate should come to him * [508] upon his daughter "and the plaintiff for the term of their lives, and the longest liver "of them; remainder to the issue of the body of his daughter, &c. "and for default, &c. to the right heirs of the defendant *Trevor*: "NOW THE CONDITION of this obligation is such, that in case "such settlement shall be made, &c."

Upon the death of the master of the rolls, *Sir John Trevor*, so considerable an estate fell to the defendant, as that the third amounted

to

HOBSON AND HIS WIFE *against* TREVOR.

to about sixteen hundred pounds a-year. And therefore the plaintiffs prayed a specific performance of the articles, insisting that the forfeiture of the penalty would not answer the end of this agreement; for that being money, would go as money to the executors of the husband, and be entirely under the husband's power; whereas the intention of this agreement, by the nature and manner of it, was to make a lasting provision for wife and children. And it was insisted that this bond was a plain and sufficient evidence of this agreement.

It was insisted *for the defendant*, that this agreement was not absolutely to settle, &c. but to settle, or in case he did not, to forfeit the penalty of five thousand pounds. The penalty of the bond, in the very nature of it, seems to be a sum fixed upon by the parties themselves, upon the payment of which the party bound shall be loosed from his obligation. And if this is to be intended in any case, it seems reasonable to intend it here, where not a shilling is settled, or agreed to be settled by the husband; so that this whole provision is on the defendant's side a perfect bounty. It was said, that the father of the young gentleman, though once a rich man, had the misfortune to lose most of what he had in the hands of a banker that failed. It was urged, that agreements to make settlements in the life-time of parents, and before any estate descended, were of ill consequence, and by no means to be favoured or supported in a court of equity. * As to the objection, that the forfeiture of the penalty would not answer the design of the parties, which was to make a lasting provision for wife and children; it was answered, that since the penalty of five thousand pounds came in lieu of the settlement, it would be in the power of this Court, upon a proper application, to have the five thousand pounds settled in the same manner, for the benefit of the wife and children.

*[509]

But it was strongly insisted *in behalf of the plaintiff*, that the agreement of the parties was to make the settlement; and not to make the settlement, or forfeit five thousand pounds. That this plainly appeared, by the recital of the bond, to be the agreement. That the end and design of the agreement was the making a provision for wife and children, which would not be attained by the forfeiture of the penalty; for that would be a debt due only to the husband, and subject entirely to his disposal. Very strange to imagine, that the defendant should insist upon a provision for his daughter and her issue, in case less than fifteen thousand pounds descended to him from his father; but in case more than that, he should take no care at all of her, but leave her entirely to the mercy of her husband. For this is the plain consequence of supposing the agreement to be, either to make the settlement, or forfeit the penalty; since in case the defendant chooses to forfeit the penalty, then the only provision for the wife and children is this penalty; which being a debt due to the husband, the court of chancery

chancery cannot oblige him to settle it, in the same manner as the land. If the circumstances of things as they stood at the time of making this agreement, and the nature of this agreement be considered, it will appear not only to have been a reasonable agreement, but an advantageous one on the side of the defendant. * The plaintiff was the son of *Sir Charles Hobson*, a very rich man; and though he had very considerable losses afterwards, yet it does not appear in the cause, but that this might be after the time of the agreement; so that there was a fair expectation; and his son was put out to a wholesale linen-draper, a very good trade, and requiring a very good stock to set up with. As to the settlement from the plaintiff, there was none to be expected, he being under age; but in consequence of his trade, he was to be a freeman of *London*, and that would be a provision. As to the defendant; it is well known, that though he was eldest son to the late master of the rolls, yet he was under his father's displeasure, and so not likely to have any thing at all, or at least but a trifle, from his father. And this is another plain evidence, that this agreement was to settle, not settle or forfeit; for his expectations being so small, the penalty of five thousand pounds must have been esteemed by the parties as a sufficient security to inforce the performance of this agreement; and it is impossible to suppose, that the defendant could be then providing in his thoughts for that election now insisted upon. As to the nature of the agreement, it is highly reasonable. A father upon the marriage of a daughter, his only child (and very like to continue so) agrees to settle a third of his estate upon a double contingency: First, The death of his father before him; for if his father had outlived him, the whole agreement was void. And secondly, In case any estate came to him from his father; for in case none came, as there was too much reason to fear, then the agreement was likewise void. Upon this double contingency a father agrees, upon the marriage of his daughter and only child, to settle one third of what he should have upon the death of his father, upon her and her husband for term of their lives, and the longest liver of them, then to the issue * of that marriage in tail, reversion to his own right heirs. Here is nothing agreed to be settled but upon his own child; the very reversion is to his own right heirs. The husband has only an estate for life; and in case of issue, the law itself had done as much for him, in making him tenant by courtesy. This is an agreement made by one of full age, and not a child; a father upon the marriage of his daughter; and therefore not like the cases of young heirs, unwarily drawn in, in the life-time of their parents, to part with reversions. The defendant himself encouraged the match; looked upon it to be so advantageous, as that he thought it reasonable to have settled half instead of a third; and bragged how well he had provided for his daughter, in case his father should die and leave him nothing.

Hobson and his Wife against Trevor.

* [510]

* [511]

Parker, *Lord Chancellor*, decreed the land to be settled pursuant to the condition of the bond; and declared, that if the agreement

Hobson and his Wife against Trevor.

ment had been to have made the settlement, or forfeited the penalty, it would have been a debt due to the husband, and not in the power of the Court to have taken care of the wife and children, by ordering the five thousand pounds to be settled.

Quare of this, it coming in lieu of the settlement.

HILARY TERM,

The Ninth of George the First,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*

Sir Joseph Jekyll, *Knt. Master of the Rolls.*

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* Cartwright *against* Cartwright. * [512]

Case 232.

Roman Catholicks.

J. S. devised to trustees and their heirs, for the life of *Sir Charles Cartwright*, and two years longer; and then taking notice, that the children of *Sir Charles Cartwright* were all beyond the seas educated *Roman* Catholicks, directs, that in case any of the sons of *Sir Charles Cartwright* should within those years become a protestant, and receive the sacrament according to the usage of the church of *England*, then the trustees were to hold the estate in trust for such son in tail; remainder over, &c. And in case no one of the sons should conform; then in case any one of the daughters should within those two years become a protestant, and take, &c. in trust for that daughter in tail; remainder over, &c. And then he charges his estate with some annuities, payable to the sons and daughters of *Sir Charles*. *Sir Charles* died; no one of his sons did within the two years become a protestant, or receive the sacrament, &c. but one of the daughters did within the two years receive the sacrament twice according to the usage of the church of *England*, and the trustees * actually permitted her to receive the rents and profits of the land. * [513]

This daughter brings a bill in equity, against the trustees, and all the children, and one in remainder being an infant (who had a right to the estate in case the daughter was not well intitled to it) to compel the trustees to convey to her, in order to enable her to dock the entail, by suffering a common recovery, and so make a good title to a purchaser.

The trustees by their answer own, that they had permitted the plaintiff to receive the rents and profits, conceiving she was well intitled thereunto, by having received the sacrament, &c. the test pitched

CARTWRIGHT *against* CARTWRIGHT. pitched upon by the testator, of the sincerity of her conversion; pray that a receiver may be appointed; and that they may be discharged of the trust.

The children all by their answers consent to the sale of the estate, and that the trustees may convey; the daughter having given a bond to pay the sum of fifteen hundred pounds in satisfaction of the annuities given to them, and charged upon the estate.

PARKER, *Lord Chancellor*. I am not satisfied of the reality of the conversion of the daughter. As to the proof offered for it; it is no more than the bare act of having received the sacrament twice; an act very common for *Roman* Catholicks to do upon a worldly motive, and then we hear no more of them. It is remarkable, that the witness who swears to her conversion does not say that he believes her now to be a protestant; but that four years ago she was one. The readiness of the children in their answers to do what is desired of them, looks very suspicious. As to the bond given for the payment of fifteen hundred pounds, I much suspect a defeasance in case this bill miscarry; and indeed I do not
[514] * see any consideration for the giving it; for the annuities charged upon the land, are certainly profits arising out of land; and the children being all *Roman* Catholicks, the devise is void as to that. Indeed, if the daughter had had a clear title, and her conversion been out of doubt, there was no occasion for coming here; for if the daughter had suffered a common recovery, or levied a fine of the trust in tail, it had been binding in equity.

Let a receiver be appointed; I will consider further of the decree.

It was pressed by the Counsel, that in the mean time they might have liberty to give further evidence of the sincerity of her conversion; and they quoted the case of *Rawlinson v. Rawlinson (a)*, before LORD COWPER, where that liberty was indulged.

THE LORD CHANCELLOR. I will do nothing now.

(a) Prec. Chan. 537.

MICHAELMAS

MICHAELMAS TERM,

The Tenth of George the First,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*

Sir Joseph Jekyll, *Knt. Master of the Rolls.*

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*[515]

Parks *against* Wilson.

Case 233.

S. C. 9. Mod. 62. S. C. 2. Eq. Abr. 22. 2. Peer Wms. 191. 1. Vezey, 301. 409. 1. Stra. 533. Fonbl. Eq. 142. 1. Powell on Contracts, 314. 2. Fonblanque's Equity, 37.

A AND *B.* brother and sister; *B.* the sister has issue two daughters, and one son called *Anthony*. *A* the brother being seised of an estate of copyhold, and intending that not his sister, who was his heir at law, but *Anthony* her son, should have the land, resolved to surrender it to the use of his will, and devise it to *Anthony*; but the officers of the court being out of the way, and a surrender not practicable, the mother consented to enter into a bond to her son, that she would at any time, upon the payment of two hundred pounds, and upon the request of *Anthony* her son, surrender the estate to him. This bond was executed in *November* 1713, about which time *A.* died. After his death, *Anthony* the son received and enjoyed the rents and profits of the estate during the life of the mother; but no surrender was ever made by the mother to *Anthony* in pursuance of the condition of the bond; nor was there any request for her so to do. * *Anthony* dies without issue and intestate, and his mother took out letters of administration; and likewise after his death, she got herself admitted, and entered upon the land, and received the rents and profits; and then devises the land to one of her daughters and dies. The other daughter, and sister of *Anthony*, brings her bill against her sister the devisee of her mother, praying to have a decree for a surrender, and proper conveyance of a moiety of the land, which she would have been entitled to, had her mother surrendered to *Anthony* her brother, as she ought to have done, in pursuance of the condition of the bond for that purpose entered into. [516]

IT WAS ARGUED *in favour of the plaintiff*, that from the nature of the case, it appeared plainly to be an agreement between *A.* and

PARKS *against* WILSON.

his sister, that her son should have the land; and that in a court of equity, this bond would be interpreted as an undoubted evidence of this agreement; and that there were several instances, where bonds had been considered in this light by the Court. It was said, that in the case of *Thynn* of *Egham (a)*, a person, being made executor upon an antecedent promise, that he would not thereby take any advantage with respect to any part of the personal estate, but let such a one have it; it was held that this promise made him a trustee in this court.—It was further insisted upon, that the mother's permission of the son to receive and enjoy the profits of the land, was a carrying this agreement into execution, which made it a much stronger case. And then if *Anthony* himself had a right at any time during his life to have come into this court, and insisted upon the specific performance of this bond, certainly death, the act of God, shall not in this court put his heir in a worse condition.

* [517] * IT WAS INSISTED *for the defendant*, that by the evidence it did indeed appear, that it was once the design of the uncle to have given his nephew this land; but that afterwards he changed his mind, and gave him this bond in the room of it. It was said, that this bond, being gone in law, upon account that *Anthony* being dead intestate, the mother the obligor had taken out letters of administration; and also by reason that there was no request made by *Anthony*, during his life, for the surrender; ought not to be set up in equity. It was said, that possibly, *Anthony* having by his mother's consent enjoyed the profits of the land, without having ever paid the two hundred pounds, might for that reason make no will; as conceiving that the bond being thereby extinguished, there would remain no obligation upon the mother to surrender.

PARKER, *Lord Chancellor*. It is plain from the nature of this transaction, that it was the fixed intention of the uncle, that, one way or other, his nephew should have the land. In order thereunto he attempted more than once to surrender to the use of his will, resolving to devise it to his nephew; but a surrender not being practicable, by reason of the accidents set forth in the evidence, he then had recourse to this bond, as the next best method to secure it to him. So that this bond is not to be considered as something given in lieu of the land, which the uncle once intended him, but as another medium of securing the land to him; and on the part of the mother it amounts plainly to an agreement that the son should have the land. The consequence of which will very plainly be, that the mother must be considered by this Court as a trustee for her son; and then I shall have no regard at all to the
* [518] niceties of law, of the bond's being extinguished and * gone either by the obligor's being administratrix to the obligee, or for want of a request (*b*). The authorities are many in this court, that bonds

(*a*) 1. Vern 296.

(*b*) See Gage *v.* Acton, Com. 67. Acton *v.* Peirce, 2. Vern. 480. Dale *v.* Smithwick, 2. Vern. 151. Cannel *v.* Buckle, 2. Peer Wms. 243. Watkins *v.* Watkins, 2. Atk. 97. Beard *v.* Beard, 3. Atk. 72.

have

have been considered as evidences of agreements, and obligors held to a specific performance (a), and not allowed to forfeit the penalty.—There must be therefore a surrender and conveyance: But then the plaintiff must pay the two hundred pounds with interest from the death of the uncle; *Anthony* having during his life, by the consent of the mother, received and enjoyed the profits of the land. PARKE *against* WILSON.

(a) Ld. Ray. 683. 2. Vern. 24. 540. 595. 2. Peer Wms. 608. 3. Peer Wms. 188. 3. Atk. 547.

Atcherley *against* Vernon.

Case 234.

MR. VERNON made his will the seventeenth of *January* 1711, and by this will he vested the bulk of his estate, real as well as personal, in five trustees, for the use of *Bowater Vernon*, *&c.* and also he gave the residue of his personal estate to the same trustees, to be invested in land, and settled to the same uses. S. C. 9. Mod. 68. S. C. 2. Eq. Abr. 209. S. C. 1. Peer Wms. 783. S. C. Comy. 381. S. C. 3. Bro. P. C. 107.

He gave his wife five hundred pounds, to be paid her presently by the trustees; and a thousand pounds a-year free from all taxes but parliamentary ones, in full satisfaction of dower, jointures, and all demands out of his real estate, to be paid by the trustees. He gave her also all his plate, and his *London* house, and the goods and furniture; he gave her likewise the use of his house at *Hanbury*, with all the demesne lands and park that he kept in his own hands, with all the goods and furniture, together with the books, for her life.

He gave his sister and heir at law, *Mrs. Atcherley*, two hundred pounds a-year for her separate use; and his niece *Lætitia Atcherley* one thousand pounds.

After the making of his will, he purchased several estates in land; some of which purchases were completed, and the conveyances executed in his life-time; * but in some they were only contracted for, part of the purchase-money paid, but no conveyance executed; and in some the time limited by the articles for executing the conveyance was not come. * [519]

He purchased likewise a copyhold estate; but that purchase was completed, save that he was pleased, that the vendor's name should be made use of in trust for him.

Mr. Vernon being seised of the manor of *Hanbury* in fee, out of which there was payable to the crown a fee-farm rent of thirty-five pounds a-year, purchased this in, and took a conveyance of this fee-farm rent to himself in fee.

Matters standing thus, *Mr. Vernon*, on the second of *February* 1720, added a codicil to his will; in which codicil he first takes notice, that he had made his will, bearing date on or about the seventeenth day of *January* 1711, and ratifies and confirms this

 his

ATCHERLEY *against* VERNON.

his will in every part thereof; save what alteration he should make by that codicil.

He further takes notice, that he had by his will given his sister and heir at law two hundred pounds a-year to her separate use, during her life, and a thousand pounds to his niece *Letitia Atcherley*; and by his codicil makes the two hundred pounds four hundred pounds, in case she survived her husband: and increases the sum of one thousand pounds to six thousand pounds, to be paid his niece upon day of marriage or twenty-one. And then declares, that his will and meaning is, that the respective legacies of two hundred pounds a-year, and the six thousand pounds, be taken and accepted of by his said sister and niece, in full satisfaction of all manner of claims and demands they or either of them had or might have upon any part of his estate, real or personal; and upon condition that they do release unto his executors and trustees all manner of claims and demands upon any part of his estate.

*[520] * Then he goes on and says: "Having thus provided for my "sister and niece, I DO DEVISE all the lands purchased by me "since the making my will, to the trustees in my will named, to "and for the same uses and purposes as the manor of *Hanbury* "stands settled by my will. And I do hereby revoke that part of "my will wherein I make *A. B.* and *C.* three of my trustees; "and I do desire *J. S.* and *J. N.* to be two of my trustees, and "do devise my said real estate to them accordingly."

Upon this will and codicil, the first point insisted upon by *Mr. Atcherley* in right of his wife, sister and heir at law to *Mr. Vernon*, was founded upon that part of the codicil, "I do thereby revoke, "&c."

IT WAS INSISTED, that he had by these words revoked that integral part of the will that related to the trust, and the uses thereby limited. Had he not intended to have done so, he would not have used those words, "that part of my will," but would have used some other words that would have manifested his intention to have related only to the persons of the trustees. It was said, that if he had intended only this, it was very strange that he should repose any trust, as to the new-purchased lands, in those very trustees thus by him put out; yet that he plainly does, for he devises them to the trustees in the will named, *viz.* all five. As the former meaning seems to be the more literal one, so it is the more favourable one to the heir at law, who will otherwise be disinherited by the will. And it is likewise an interpretation that makes the codicil uniform and consistent with itself. For immediately after this, there follows a new devise of all his estate to the two new trustees; which clause, supposing the former not to be a revocation, is plainly inconsistent, and itself a revocation. And as there is no new trust appointed by this new devise, the law implies that, and says, to the use of the heir at law. * But admitting, that the devise to these new trustees, by virtue of the word "accordingly," should be

Where the words of a will are dubious, the heir at law to be favoured. 2. Vern. 340.

Where land is devised to trustees, and no use declared, the law will imply it to be to the use of the heir.

*[521]

be taken to be, to and for the ſame uſes and purpoſes as are mentioned in the will; yet inaſmuch as the lands are deviſed to the truſtees, only omitting the words "and their heirs," they can take only an eſtate for life; and an eſtate for life cannot ſupport a uſe in fee; at leaſt the reverſion upon the eſtate of the truſtees for life will deſcend on the heir at law.

It being foreſeen by *Mr. Atcherley*'s Counſel, that the clauſe of the releaſe to be given by the ſiſter and niece would be urged as a plain proof that it was the teſtator's intention that his heir at law ſhould have nothing more; they endeavoured to obviate that objection by ſaying, that as the ſiſter had then a ſubſiſting demand upon the eſtate of *Mr. Vernon* (as it was admitted ſhe had), it was probable, that the releaſe was directed by the teſtator with a view to that only, and not to any further claim; it being very unlikely to ſuppoſe, that a man who is maſter of his own eſtate, and may diſpoſe of it where he thinks fit, ſhould order his heir to releaſe, in order to cut him off from the eſtate, when the very deviſing of it away does that as effectually as five hundred releaſes poſſibly can.

For the defendant.

ON THE OTHER SIDE it was ſaid, by the Counſel for *Mr. Bowater Vernon*, that a revocation was no more to be preſumed than the diſinheriſon of an heir. That the only uſe of wills is the diſinheriting of heirs, and preventing that deſcent which would otherwiſe fall upon them. It is the buſineſs of all courts ſo to conſtrue a will, as that the whole may be conſiſtent; and revocations ariſing from inconſiſtencies will never be admitted but where the inconſiſtency is plain and unavoidable: * Therefore if, in the beginning of a will, land is deviſed to *J. S.* and afterwards in the ſame will the ſame land is deviſed to *J. N.* the law will make them jointenants rather than the latter part ſhould be eſteemed a revocation of the former. But it is ſo far from being doubtful whether the teſtator did intend to revoke the diſpoſitions in the will by this codicil, that it is very plain, from the whole tenor of it, that he intended the contrary. In the very beginning of his codicil he takes notice of the making of this will, and then ratifies and confirms it. Then he makes an additional proviſion for his ſiſter and niece; and then directs that they accept the ſame "in full "ſatisfaction, &c.:" words that very plainly and ſtrongly import that he intended them nothing more. But if this intention of his can be plainer, he has made it ſo, by the releaſe he has directed them to give. For though, poſſibly, he might principally have in his view the demand he then knew his ſiſter had upon him; yet when ſuch general words are uſed as comprehend every thing, it amounts to a demonſtration, that he did not intend them the bulk of his eſtate. And it is not at all abſurd to ſuppoſe, that not being able to foreſee what diſputes might ariſe, what points might be ſtarted, how frivolous ſoever, he might even, to prevent theſe as far as in him lay, direct and appoint this releaſe. After this he goes on thus, "having thus provided for my ſiſter and niece, &c.:"

* [522]

 words

ATCHERLEY against VERNON.

words plainly again implying he never intended them any other provision. The expression in the codicil, "three of my trustees," plainly implies, that the testator thought there remained more trustees who had trusts reposed in them; all which could not be so upon supposition of a revocation. The following expression, "to be two of my trustees," corroborates the foregoing observation.

*[523] * But this observation stands yet further strengthened, from his appointing no new trusts for the new trustees. For upon supposition that the testator did suppose, as it is evident he did, that his will was to continue, and that some of the trustees in his will were to continue such, and so the same uses and purposes in the will mentioned, then was there plainly no occasion to declare any new use, but the bare making them trustees was abundantly enough; though if more were necessary, this one word "accord-"ingly," being a relative word to the uses in the will, is tantamount to the repeating them in the codicil. Besides all this, his devising his lands purchased since the making of his will to the same uses as his manor of *Hanbury* stands limited by the will, plainly proves, that the testator imagined that these uses were continuing uses; and that he was very well pleased with them. Add to all this, that by interpreting this to amount to a revocation, the provision of 4 thousand pounds a-year made for his wife is quite overthrown, because it takes away the fund out of which it is to arise.

Not the same exactness required in the words of a will as in those of a deed.

Salk. 621.

As to the objection taken from the omission of the word "heirs," in the devise to the new trustees, it was observed, that a will is always to be interpreted according to the intention of the party; and that there is no legal form of words whatsoever necessary in a will (as in a deed there is) to pass a fee-simple; but whatever words make it plain the testator intended it, will be sufficient for that purpose. And therefore here a fee shall pass to the trustees, without the word "heirs," because it is impossible that any other estate could support the uses for which the estate was given them.

It is absurd to the last degree to suppose a man should, in one and the same breath, *viz.* the same codicil, ratify and confirm his will, and former disposition of his estate, and then overturn all at once;

*[524] and this in favour * of his heir at law, for whom he had been providing in this very codicil, and declaring very fully and expresly, that he intended nothing else at all for her. The meaning of *Mr. Vernon* is so full and clear, that no one but a lawyer could ever have mistaken it. And after all, in order to mistake it, it is necessary to vary from the literal meaning of his words; for had he meant and intended what the other side would have had him, he ought not to have said, I hereby revoke that part of my will, but that clause; for if it be asked, What is that part of the testator's will whereby *A. B.* and *C.* are made trustees, is not the answer barely their names? So that in a literal sense, which is likewise the real and natural sense, no part of the will is hereby revoked but that part of the will where these trustees are named, *viz.* their names

names. The bare naming them made trustees, and the revoking the naming of them puts them out of the trust.

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This point was clearly decreed by THE LORD CHANCELLOR in favour of *Mr. Vernon*.

In the arguing of this point, the case of *Vachel v. Vachel* (*a*) was cited by *Mr. Vernon's* Counsel; where, upon a bill brought by the eldest son to have his distributory share of the personal estate, it was decreed against him upon this single circumstance, that the testator, by giving him a shilling in satisfaction of every thing he might claim out of his estate, had manifested his intention to be, that he should have nothing at all.

Devise of a shilling to an eldest son, in satisfaction of all claims, held sufficient to exclude him from his distributory share of the testator's personal estate.

Another point insisted upon by *Mr. Atcherley's* Counsel was, that the fee-farm rent of thirty-five pounds a-year, issuing out of the manor of *Hanbury*, and purchased in by *Mr. Vernon*, did not pass to the trustees by the word "lands."

2d point. Whether a fee-farm rent should pass in a will by the word *lands*?

*[525]

It was said, that an heir at law is never to be disinherited, but by very clear and plain words (*b*); that therefore the word "land" should never be extended to comprehend fee-farm rents, to the disinheriton of an heir at law, unless where the word can relate to nothing else, and so otherwise be totally void. And upon that distinction went the case of *Inchly v. Robinson* (*c*). The devisor being seised of a fee-farm issuing out of the manor of *Fremington*, and of no other land whatsoever, devised his manor of *Fremington* to *J. S.* And it was there held, that the devise of the manor of *Fremington* were words in a will sufficient to pass the fee-farm rent issuing out of that manor; for the devisor being seised of that rent, and nothing else in that manor, it was plain, that the testator meant the rent, and could mean nothing else: so that otherwise the will must have been entirely void.

For the plaintiff. There must either be express words in a will, or a necessary implication to disinherit an heir at law.

2. Vern. 571. 3. Salk. 128. Where a devise of the manor of F. passed a fee-farm rent issuing out of that manor; because otherwise the will must have been void, the testator being seised of nothing else in that manor but the fee-farm rent.

TO THIS *it was answered*, by the Counsel for *Mr. Vernon*, that *Mr. Vernon* the testator being seised in fee of the manor of *Hanbury*, out of which this fee farm rent did issue, had merged the rent in the inheritance, by taking a purchase of it to himself in fee. But it was further insisted upon, that such a rent would very well pass by the word "land." The case of *Inchly v. Robinson* proves, that the word is sufficient to pass it, where the intention of the testator is plain that it should pass; for the word "land" is certainly as comprehensive as the words in that case, *viz.* "the "manor of *Fremington*;" nor could the circumstance of the testator's having nothing else to pass more strongly shew the intention of the testator that it should pass in that case than the release in the present. Where a man had a portion of tithes in fee,

For the defendant. Merger.

(*a*)
(*b*) See Denn v. Gaskin, Cowp. 661.
(*c*) 2. Leon. 41. 3. Leon. 165.

 held,

ATCHERLEY *against* VERNON. held, that that should pass in a will by the words "all my free "lands." It is true, the testator had in that case nothing else; but that is a circumstance of no weight, any * further than as it
* [526] serves to shew what the testator intended, which the release directed does abundantly in the present case (a). The word "livelihood" will pass land in a will, Fee-farm rent is extendible upon an *elegit*, and yet the words of the statute that gave the sheriff authority are only "*land*," *medietatem terræ*.

LORD CHANCELLOR. Merged in the inheritance, and purchased by the testator with a view that it should be so. Besides, the word "lands" is sufficient to pass it; especially in a will, and where the intention of the testator is so very plain, as here it is, that it should pass.

3d point. Whether lands contracted for, but not conveyed, should pass by a devise in a codicil of all the lands purchased since the making the will?

ANOTHER POINT insisted upon by *Mr. Atcherley*'s Counsel was, that the lands contracted for where no conveyance was executed, and especially those lands where the very time fixed by the articles for executing conveyances was not come at the time of the making the codicil, did not pass by it, and consequently would descend to the heir at law.

It was admitted, that if there had been no other lands purchased since the making of the will, where the conveyances had been executed, there, possibly, rather than this clause should be entirely frustrated, they should pass: and in that case, the vendor would in a court of equity be considered as a trustee for the purchaser; for

Maxim of equity.

equity always considers things that ought to be done in the same light as if they were done. But here, there being other lands purchased since the making of the will, where the conveyances have been executed, the words of the codicil being satisfied by those lands ought not to be extended any further; especially to the disinheriting of an heir at law. Nay, in case there were no other lands, this rule of equity could be extended no further than to such
* [527] purchases, where though no conveyances were actually * executed, yet the time fixed by the articles for the execution of them was passed; and then those lands where the time limited for the executing of conveyances was not yet come will not pass, but descend upon the heir. If the testator had intended otherwise, he might have made this very plain by expressing himself thus, "lands "since purchased or contracted for."

For the defendant.

IN ANSWER TO THIS *it was said*, that upon all the circumstances of the will and codicil taken together, nothing could appear plainer than that it was the intention of the testator they should not descend to the heir at law, but pass by the codicil. And if the intention be plain, it cannot be controverted but that the words made use of by the testator in the codicil, *viz.* "all the lands purchased "by me since the making my will," and "my said real estate," are large enough to take them in.

(a) Stiles, 261.

It was admitted by the Counsel of the other side, that the words would have passed them, in case there had been no other lands. And why is that? Only because it would have been then evident the testator had intended them to pass; and here the release ordered by the testator speaks this full as strongly.

As to the difference taken between where the time limited for the executing of these conveyances is past, and where yet to come, nothing at all in it; for that relates only to the terms of the trust reposed by equity in the vendor. A material circumstance, that in every one of these contracts part of the purchase-money was paid. A known and established rule in equity, that from the time of the contract the vendor is a trustee for the vendee. Upon this foundation it is, that a bill lies in equity against the vendor for a specific performance. Nay, should the vendor afterwards sell this land to another, having notice of this precedent * contract, * [528] equity still transfers the trust; and the second vendee may in such case be compelled to a specific performance. These words "contracted for" and "purchased" are very commonly used promiscuously.

Besides, if this were not to be considered as real estate, then it must be personal estate, for there is no medium; and if so, it is given to the trustees to be by them invested in land, and settled to the same uses: but if it be to be accounted as real estate, and as such descendible to the heir at law, then it is devisable, and will pass by the words of the codicil.

Cases quoted to this purpose were, *Lingen v. Souray*, in LORD HARCOURT's time: A man by his will gave all his land in the county of *York* and kingdom of *England*, and had no lands at the time of his death, but only had obliged himself by marriage-articles to purchase lands to the value of fourteen hundred pounds. And held that this fourteen hundred pounds should be considered as real estate, and was well passed by the will. In that case, the case of *Atkins v. Atkins* (*a*), in LORD JEFFREYS' time, was quoted.

Affirmed upon a re-hearing by Lord Chancellor Cowper. See Rep. of Cas in Equity, 91 Ante, 39.

The case of *Woodier v. Greenhill* (*b*): Freehold land was devised to trustees; the land was contracted for before the will, viz. in *April*; the will was made in *June*; time fixed by articles for the conveyance was at *Michaelmas*; yet held, by LORD HARCOURT, that the land passed; he being of opinion, that had the testator died before the conveyance, and made no devise of it, the heir might have claimed it as land, and compelled the executor to have paid for it out of the personal estate; and consequently, if the devisor had such an interest in the land contracted for as was descendible, it was devisable. * [529] And *Mr. Vernon* the present testator, being of Counsel in that case, insisted very much upon the absurdity of supposing it neither real nor personal estate; * for if personal estate, it must not descend to the heir, which all held it would; if real estate, and consequently descendible, then it was well devised.

2. Vern 679. Rep. of Cas. in Equity, 77.

Whatever is descendible to the heir at law as real estate, is devisable as such.

(*a*)

(*b*) 1. Eq. Abr. 174. 2. Vern. 679. Rep. Eq 77. Prec. Ch. 320.

Case

ATCHERLEY *against* VERNON.

Case of *Prideaux v. Gibbon* (a): A man having contracted for an estate, devises all his land to be sold for the payment of his debts; and after the making of the will, the land was actually conveyed to him in pursuance of the antecedent contract: the Court decreed the land to be sold for the payment of his debts. And if the testator had power to devise an estate contracted for, before conveyance, for the payment of his debts, he might certainly have devised it in any other manner. Said in that case, by the Lord Chancellor, that where a man devises his land to be sold for payment of his debts, and he afterwards purchases lands, equity will decree a sale, though there were no articles entered into precedent to the will.

THE LORD CHANCELLOR was of opinion, that all the lands contracted for by the testator, as well as those which had been actually conveyed to him, did pass by the codicil.

Copyhold lands devisable without a surrender, if the testator has only an equitable, and not the legal estate. 2. Vern. 680.—See the state of the case, ante.

THEN *Mr. Atcherley's* Counsel insisted, that the copyhold land did not pass by the codicil. But held clearly that it did.

Whether manuscripts should descend to the heir at law?

THEN it was insisted upon by *Mr. Atcherley*, that some manuscript reports of cases in chancery, found in the *London* house, did belong to the heir at law, as guardian of the reputation of his ancestor. It was said, that if the tomb or monument of an ancestor be defaced or destroyed, an action lies for the heir at law; and that by parity of reason, as those manuscripts were intended by the testator as a monument to transmit his learning and reputation

*[530] to posterity, the law would intrust the heir with the care of * them, that they should be printed in such a manner as would be most for the honour of *Mr. Vernon's* memory. The printing, or not printing, these papers, may as much affect the reputation of *Mr. Vernon* as any monument or tomb. Possibly, they are not fit to be printed; possibly they were never intended to be printed. This is not in the nature of the thing fructuary; and will not therefore fall within that clause that gives the residue of the personal estate to the trustees. Suppose a man of learning should have the misfortune to die in debt, Can the creditors come into this court and pray a discovery of all his papers, that they may be printed for the payment of his debts? And if creditors cannot do this, *à fortiori* not the trustees in the present case. If a minister of state should die, he may have a great number of papers that may be very curious, may print, and sell well; yet surely these will not be considered as personal estate, and go to the executor. As therefore papers found in a man's study, not being in their nature fructuary, are not considered as personal estate, and in case of no will would not have gone to the administrators of *Mr. Vernon*; so it was argued, that they did not pass under that clause where the residue of his personal estate is given to the trustees. It was resolved in the

(a) 2. Chan. Cases, 144.

Earl

Earl of Northumberland's Case (a), that notwithstanding all his jewels were devised to his lady, yet his garter and collar of SS should go to the heir.

ON THE OTHER SIDE it was strongly insisted upon, that it was personal estate, and was devised to the trustees by those words, "the residue of my personal estate."

* IT WAS INSISTED *in behalf of the widow*, that she ought to have them, as included in the devise of "houshold goods and furniture." * [531]

THE COURT decided nothing in this affair, because all consented to have them printed under the direction of the Court, without making any profit of them.

Those points being thus determined against *Mr. Atcherley*, *Mr. Vernon*'s Counsel, in virtue of a cross-bill brought for that purpose, prayed, that the Court would decree *Mrs. Atcherley* and her daughter to release in the most effectual manner, or else to waive their legacies; for which the case of *Thorold v. Thorold* (b) was cited.

This, as highly reasonable, was directed by THE COURT.

A legacy of 200l. given to V.'s wife by her father, to be laid out by her in what she should think fit in remembrance of him. Decreed, she should have the 200l. over and above the provision made for her by her husband's will.

THERE WAS ANOTHER POINT contested by *Mrs. Vernon* the widow, which was this: *Sir Anthony Keck*, *Mrs. Vernon's* father, did, by his will made in 1695, devise the sum of two hundred pounds to his daughter, *Mrs. Vernon*, in these words, *viz.* "to be by her laid out in what she shall think fit in remembrance of me." He gave also another legacy of fifty pounds to the deceased *Mr. Vernon*, and made him one of his executors.

It was said, that taking all those circumstances together it must be intended, that the testator did plainly design this as a legacy to the separate use of his daughter, though he does not use those very words; and therefore, as the testator never designed that this money should be sunk in the estate of her husband, the estate of the husband ought to be still liable to this demand, in the hands of the trustees.

And IT WAS DECREED accordingly for *Mrs. Vernon*. * [532]

A devise of all the personal estate will pass whatsoever personal estate the testator dies possessed of.

* NOTE, It is a point of law very well known, that if a man devise all his personal estate, and die worth double the personal estate he had at the time of the making the will, all his personal estate will pass. But if a man devises all his real estate, no land purchased after the making of the will shall pass by it.

The reason of this difference in devises of real and personal estate.

This difference THE LORD CHANCELLOR was pleased thus to account for, that the statute which made lands first devisable (c) uses these words, a man "having lands." So that the parliament seemed to consider devise as another instrument of conveyance; and therefore the rule has always been, that a man can devise nothing but what he might by deed convey.

(a) Owen, 124.
(b)

(c) Stat. 32. *Hen.* 8. cap. 1 and stat. 34. & 35. *Hen.* 8. cap. 5.

Quære,

Aitcherley *against* Vernon.

Quære of this. For admitting that a will is to be considered as a conveyance, yet like other conveyances that are not esteemed valid until sealed and delivered; so a will ought not to be reputed as a will until the death of the testator, when it takes effect; and it might not seem unreasonable to consider a will as wrote every day of a man's life that it lies by him unaltered.

2. Vern. 638.

The true reason of this difference, as seems to me, must be taken from the fluctuating nature of personal estate; so that death is the only time when this is capable of being reduced to a certainty; it being next to impossible to discover what the personal estate of the testator amounted to, or consisted in, at the time of making his will.

MICHAELMAS

MICHAELMAS TERM,

The Eleventh of George the First,

IN

The Court of Chancery.

Earl of Macclesfield, *Lord Chancellor.*

Master of the Rolls.

* [533]

Osgood *against* Stroud. Case 235.

If a father, in consideration of marriage, settle an estate upon his first son for life, remainder to his wife for life, remainder to the issue in tail, with remainder to his fourth son in fee, the fourth son, on the death of the husband and wife without issue, may compel a specific performance of this settlement. Ante, 469. 471. 476.

BY MARRIAGE-ARTICLES it was covenanted, that land should be settled upon husband for life, wife for life, then to the issue of that marriage in tail, remainder to the fourth son of the husband's father. This fourth son died, leaving behind him a daughter married to the plaintiff, who brings his bill, the estate-tail being spent and no settlement made, to have the articles performed specifically, by settling, &c. in opposition to the defendant, to whom, as heir at law, it would descend in case of no settlement.

IT WAS ARGUED *for the defendant*, that though these articles were founded upon the consideration of marriage, yet they must be esteemed voluntary for so much of them as that consideration would not reach or cover; and a court of equity will not, in favour of volunteers, aid a defective settlement, much less decree one where there is none. * The plaintiff, who is a remainder-man after the limitation to the issue of the marriage, is certainly a volunteer; and then the question is singly, Whether the Court will interpose so far in favour of a volunteer as to carry a covenant to settle into execution, to the prejudice of the heir at law, upon whom it would otherwise descend. That the Court would not the following cases were cited: The case of *Robinson v. Kirsaire* (a); the case of *Thompson v. Lord Haversham* (b), before LORD COWPER; the case of *Bellingham v. Louther* (c). This last case was much relied upon.

* [534]

S. C. 2. Eq. Abr. 25. S. C. 2. Peer. Wms. 245.

FOR THE PLAINTIFF *it was said*, that trusts, though voluntary, must be performed; that they may be created as well by articles

(a) Prec. Chan. 475. (b) (c) 1. Chan. Cases, 243.

Osgood against Stroud.

as otherwise, and as well by marriage-articles as any other way; that here, there being a covenant to settle, &c. the question was, Whether this not being performed by the ancestor, an implied trust to do this was not devolved upon the heir. In the case of *Jenkins v. Keymis*, reported both in *Hardres* (a) and the *Chancery Cases* (b), it is expressly affirmed by Lord Chief Baron Hale, that the consideration of a marriage-portion will extend and run through all the uses in that settlement; and what consideration would be good by way of settlement will be so by way of articles.

Macclesfield, *Lord Chancellor*. It seems clear to me, that where there is a marriage-portion and settlement, that part of the settlement only which belongs to the wife and children by that wife can be esteemed to be founded upon the consideration of that marriage; for it is absurd to imagine, that the friends of the wife should be supposed as at all concerned about the remote uses of the settlement, upon persons to whom they are entire strangers. And
[535] as for the case of *Jenkins v. Keymis*, it ought * not to be understood in so absurd a sense as that comes to. The meaning of the case is no more than this, that a father, when he makes a marriage-settlement upon one son, has such a proper, fair, and justifiable opportunity offered him of providing for his other children, as that if he thinks fit to lay hold upon and embrace it, by inserting in the settlement provisions for them, such provision shall never be esteemed as fraudulent, and as such set aside in favour of creditors. Therefore it is very plain to me, that the plaintiff must be considered as a volunteer, if there was nothing more in the case than the consideration of the marriage and the marriage-portion. But upon supposition, that the estate was neither all in the father nor all in the son, so that neither could, without the assistance and help of the other, have made this settlement, then it may be very natural to suppose, that this part of the settlement, under which the plaintiff claims, might be founded upon an agreement between father and son. For it is very natural for the father to tell the son, "I must provide for my other children as well as you; and therefore, unless you will consent to this, I will not join with you in making this settlement." And then this remainder-man, the plaintiff, must not be considered as a volunteer, but as one claiming under the consideration of the father's doing that, to enable the son to make the settlement, which he was not bound to. This I take to be the state of the present case; for by the evidence it seems to me, that the father had a power of charging the estate with the payment of thirteen hundred pounds, which probably he might depart from, upon the consent of his son to that part of the settlement under which the plaintiff claims.

Upon this reason, without determining the point that related to volunteers, he decreed a settlement to be made upon the plaintiff, pursuant to the articles (c).

(a) Hard. 395.

(b) Chan. Cases, 103.

(c) Edwards v. Warwick, 2. Peer. Wms. 175. Neave v. Keck, 9. Mod. 106. Vernon v. Vernon, 4. Brown. P. C. 26. Goring v. Nash, 3. Atk. 186. Stephens v. Trueman, 1. Vezey, 73. Roe v. Mitton, 2. Wils. 356.

TRINITY

TRINITY TERM,

The Eleventh of George the First,

IN

The Court of Chancery.

King, *Lord Chancellor.*

, *Master of the Rolls.*

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* [536]

* Hill *against* Filkins and his Wife. Case 236.

WHEN this case was before LORD MACCLESFIELD, he was strongly of opinion for the plaintiff, the heir at law; but in order to bring the matter more fully before him, he made an order directing some issues to be tried.

A devise of land to a *Roman* Catholic, who is under eighteen years of age at the death of the testator and conforms within six months after attaining the said age, is a good devise.

From this order the defendant appealed to THE HOUSE OF LORDS, as having directed issues to be tried, that were not warranted by the pleadings.

The House of Lords set the order aside, but gave the plaintiff leave to amend his bill; which he did.

S. C. ante, 481.
S. C. 9. Mod. 154.
S. C. Cases Ch. 22.
S. C. 2. Peer Wms. 6.
S. C. 2 Eq Abr. 622. 624.

And upon this amended bill, and the pleadings thereupon, the point in law came now to be spoken to again before LORD CHANCELLOR KING, *viz.* Whether the grand-daughter, the defendant, having conformed by taking, &c. according to the act, &c. within six months after attaining the age of eighteen, was capable of taking the residue under this will; she being about fourteen at the time of the death of the testatrix.

* KING, *Lord Chancellor*, clearly and strongly decreed in favour of the defendant, contrary to the opinion of LORD MACCLESFIELD.—This act of parliament makes no difference as to the religion of those from whom the estates come, whether protestants or papists; but regards only the religion, age, and circumstance of those to whom they come. In this case, it must be admitted upon the authority of the case of *Roper v. Radcliffe*, FIRST, that the *residuum* disposed of by this will is land. SECONDLY, Upon the authority of that case, it must likewise be admitted, that the word "devise" is included in the word "purchase," in the second clause

* [537]

Ante, 90. 95. 234. 247.

of

HILL *against* FILKINS AND HIS WIFE.

of that act. And I think the House of Lords were very right in that determination; because otherwise, this clause in the act would in abundance of cases have been entirely useless. But it does not from hence follow, that all devises whatsoever must be included under this word; without excepting even devises, that appear to me to be allowed of by the former clause, or rather the first part of this clause, for the whole is indeed but one clause. The legislators had two sorts of persons under their view; *viz.* persons under the age of eighteen, and persons over that age. As to the former, the legislators looked upon them as too young to be fixed upon rational grounds in any religion whatsoever; and therefore laid upon these only a temporary disability, removeable upon conformity. But for persons above that age, and who might be supposed fixed and riveted in their religious sentiments, the legislators thought it to no purpose to expect their conversion; and [538] therefore laid a total disability upon them. * Not to understand the act of parliament in this manner, would be to make the legislators overturn their plain and apparent intention in the first clause, by the second. The defendant therefore is plainly capable of taking by devise under this will, being under the age of eighteen, at the time of the death of the testatrix; and having performed those external acts that were pitched upon by the parliament as a sufficient proof of her conformity.

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